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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1840

CITY OF ROME, BRUCE HAMLER, and H. F. HUNTER, JR.,
Appellants,

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
Appellees.

On Appeal From the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

Appellants, the City of Rome, Georgia, Bruce Hamler, and H. F. Hunter, Jr., appeal from the final orders of the United States District Court for the District of Columbia entered on February 22, 1978 and April 4, 1979, and thereby bring to this Court novel and important questions concerning the intended and permissible impact of the Voting Rights Act of 1965 (the "Act"). Specifically, what is the impact of the Act, and the Constitution, upon a political subdivision which is found to be innocent of any discriminatory purpose

in adopting certain voting practices and procedures and certain annexations? Or, put more generally, is a racial quota of electoral success required by the Act, and is such a quota permitted by the Constitution? Though these questions have apparently never been considered by this Court, they are likely to recur with frequency.

Appellants argue that the appropriate resolution of these questions should include a determination that the Act was not intended to affect electoral changes or annexations by a political subdivision innocent of any illegal purpose,[1] or that if such effect were intended by the Congress, a coincident opportunity to avoid that effect was created by the so-called "bailout" mechanism of the statute. Failing both of these proposed intentions of the Congress, the Act exceeds the acknowledged substantive content of the Fifteenth Amendment, or, in the alternative, infringes on the limitations established by the First, Fifth, Ninth and Tenth Amendments and is invalid.

Despite Rome's innocence of purposeful discrimination, and as an inherent result of Section 5 of the Act, no scheduled local elections have been held in the City of Rome since 1974. All of the citizens of Rome

[1] Appellants specifically contend, *inter alia*, that the court below erred in determining that "Congress can be said to have instructed the courts that the existence of racially disproportionate impact raises an irrebuttable presumption of invidious purpose," p. 36b, *infra*. The kafkaesque result of this holding is that although a jurisdiction may disprove, as Rome has, the existence of any invidious purpose, such proof is to no avail because Congress has supposedly said that where disproportionate impact exists purpose *cannot* be disproved.

have thus been denied their rights of political participation.

For these reasons, Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial statutory and constitutional questions are presented.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia rendered on February 22, 1978, which appears at p. 1a, *infra*, is reported in 450 F. Supp. 378 (D.D.C. 1978). The opinion of that court rendered on April 9, 1979, which appears at p. 1b, *infra*, is presently unreported.

JURISDICTION

This suit was brought by the City of Rome and certain of its citizens, both individually and as city officials, seeking a declaratory judgment pursuant to Section 4 of the Act, 42 U.S.C. 1973b, and Section 5 of the Act, 42 U.S.C. 1973c.

On February 22, 1978, the district court dismissed the portion of Appellants' complaint which contended that the Attorney General of the United States unconstitutionally applied Section 5 of the Act to the City of Rome. 450 F. Supp. 378 (D.D.C. 1978); see p. 13a, *infra*. On April 4, 1979, the court denied Appellants' motion for summary judgment, granted the motion for summary judgment of Appellees with respect to the balance of Appellants' complaint, and dismissed Appellants' case. See p. 1b, *infra*.

A notice of appeal to this Court was duly filed in the United States District Court for the District of Columbia on May 2, 1979. See p. 1f, *infra*.

This appeal is being docketed in this Court within ninety days from the final order of the court below dismissing the case. The jurisdiction of this Court is invoked under 42 U.S.C. § 1973b(a) and 42 U.S.C. § 1973c.

STATUTES INVOLVED

Section 4 and Section 5 of the Voting Rights Act of 1965, Pub. L. No. 89-110, Title I, §§ 4 and 5, 79 Stat. 438-439, *as amended by* Pub. L. No. 91-285, §§ 3-5 (June 22, 1970), 84 Stat. 315, *as amended by* Pub. L. No. 94-73, §§ 101, 201-203, 204, 206 (Aug. 6, 1975), 89 Stat. 400-402, 404 [codified at 42 U.S.C. §§ 1973b and 1973c (1970)], are set forth in full beginning at p. 1c, *infra*. Certain provisions of the Georgia Municipal Election Code, which were precleared by the Attorney General of the United States, GEORGIA LAWS 1968, pp. 885, 887, GA. CODE ANN. § 34A-102 (1970); GEORGIA LAWS 1968, pp. 885, 913-914, GA. CODE ANN. § 34A-902 (1970); GEORGIA LAWS 1968, pp. 885, 977-978, GEORGIA LAWS 1970, pp. 341, 344, GA. CODE ANN. § 34A-1407 (1970), are set forth in full beginning at p. 1d, *infra*. The changes to the Charter of the City of Rome which have been objected to by the Attorney General, GEORGIA LAWS 1966, pp. 2375-2378, 2382-2386, 2815-2819, 3083-3087; GEORGIA LAWS 1967, pp. 3296-3298; GEORGIA LAWS 1970, pp. 2563-2566; GEORGIA LAWS 1971, pp. 3664-3666, are set forth in full beginning at p. 1e, *infra*.

QUESTIONS PRESENTED

1. Whether electoral changes and annexations, enacted without discriminatory purpose, are prohibited by Section 5 of the Voting Rights Act.
2. Whether municipalities located in states covered by the provisions of the Voting Rights Act can independently "bailout" from the coverage of the Act.
3. Whether Congress is empowered, pursuant to Section 2 of the Fifteenth Amendment of the Constitution, to prohibit electoral changes and annexations found to be enacted without discriminatory purpose.
4. Whether Section 5 of the Voting Rights Act intrudes upon basic concepts of Federalism and rights guaranteed by the First, Fifth, Ninth and Tenth Amendments of the Constitution.
5. Whether the Attorney General of the United States "precleared" the electoral changes and annexations presently before the Court.

STATEMENT OF THE CASE

This case arose as a result of the refusal of the Attorney General of the United States to preclear certain changes to the Rome City Charter,[2] including (1) creation of a majority vote requirement for the City

[2] In Georgia, a city charter is a state law of local application. While cities have some home rule powers, changes in electoral processes can only be made by the Georgia General Assembly. Hence, the electoral provisions of which Rome sought preclearance are laws of the State of Georgia. GA. CODE ANN. § 69-1018 (1976). See Second Supplement to Parties Stipulation of Facts, Exhibits 38, 39, 41.

Commission and Board of Education elections, see pp. 2, 7, 11, 16e, *infra*, (2) creation of numbered posts in connection with City Commission and Board of Education elections, see pp. 2, 7, 11e, *infra*, (3) establishment of a ward residency requirement for Board of Education elections, see p. 10e, *infra*, and, (4) institution of staggered terms for the City Commission and Board of Education, see pp. 2, 11e, *infra*. In addition to these changes, the Attorney General objected to thirteen annexations [3] insofar as they related to City Commission elections.

These matters, and others no longer at issue, were submitted to the Attorney General for preclearance on August 21, 1975.[4] An objection was entered on October 20, 1975. On May 24, 1976, Rome requested reconsideration. Rome voluntarily supplemented its request for reconsideration on July 14, 1976. The Attorney General denied the request for reconsideration on August 12, 1976.

On May 9, 1977,[5] Appellants filed this action, seeking a declaratory judgment, pursuant to Sections 4,

[3] Three of the annexations were state-enacted, and ten were local ordinances. Nine of the areas annexed had *no* population at the time of annexation, see p. 52b, *infra*.

[4] The Attorney General did not object to a reduction in the number of wards in Rome from nine to three or to the conduct of runoff elections, and his objections to forty-seven annexations were withdrawn, see pp. 15-16b, *infra*. The court below approved Rome's transfer of voter registration to Floyd County. See p. 15b, *infra*, note 46. With respect to the lapse of time between enactment of the electoral changes and submission to the Attorney General, see note 21 *infra*. Five elections were conducted under the system established by these electoral changes before elections were frozen.

[5] Appellants, prior to the ruling in Morris v. Gressette, 432 U.S. 491 (1977), brought suit against the Attorney General in the United States District Court for the Northern District of Georgia

5 and 14 of the Act, that (1) the prohibitions of Section 5 of the Act are constitutionally limited to cases of purposeful discrimination; (2) Section 5 violates Article IV, Section 4, and the First, Fifth, Ninth and Tenth Amendments to the Constitution; (3) the Attorney General unconstitutionally applied Section 5 to the City of Rome; (4) the City of Rome is entitled to bailout from the coverage of the Act, pursuant to Section 4, because it has not used any test or device during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color; (5) the electoral changes and annexations were precleared by the Attorney General; (6) the electoral changes and annexations did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color; and (7) Appellants were entitled to an award of attorneys fees.

On February 22, 1978, the court below dismissed Count V of Appellants' complaint, which contended that the Attorney General unconstitutionally applied Section 5 of the Act to the City of Rome. 450 F. Supp. 378 (D.D.C. 1978); see p. 13a, *infra*. On April 4, 1979, in an order which was followed on April 9, 1979, by an unreported opinion, the court denied Appellants' motion for summary judgment, granted that of Appellees on Counts I, II, III, IV and VI of Appellants' complaint, and dismissed Appellants' case. See pp. 1-2b, *infra*. (No ruling was made on Count VII, the prayer for attorneys fees.)

pursuant to the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (1970). City of Rome v. Bell, No. C76-159R (N.D. Ga. Feb. 24, 1977). Upon dismissal of that case, Appellants sought relief in the District Court for the District of Columbia.

Though refusing the requested relief, the district court found a complete absence of racial discrimination in the political affairs of Rome and a history of black involvement in Rome's political processes: (1) "..o literacy test or other device has been employed in Rome as a prerequisite to voter registration during the past seventeen years," see p. 5b, *infra*; (2) "the City has not employed other barriers to registration with respect to time and place, registration personnel, purging or reregistration," see p. 6b, *infra*; (3) "there have been no other direct barriers to black voting in Rome" and "[i]ndeed whites, including City officials, have encouraged blacks to run for elective posts in Rome," see p. 7b, *infra*; (4) "white elected officials of Rome, together with the white appointed City Manager, are responsive to the needs and interests of the black community," see p. 7b, *infra*; (5) "[t]he City has not discriminated against blacks in the provision of services and has made an effort to upgrade some black neighborhoods," see p. 7b, *infra*; (6) "the City transit department, with a predominantly black ridership, is operated through a continuing City subsidy [a]nd the racial composition of the City workforce approximates that of the population, with a number of blacks employed in skilled or supervisory positions," see pp. 7-8b, *infra*; (7) "[i]n Rome politics, the black community, if it chooses to vote as a group, can probably determine the outcome of many, if not most, contests [and] [t]hus, many white candidates vigorously pursue the support of black voters, see p. 8b, *infra*; (8) "the City has carried its burden of showing that its non-annexation voting changes were not enacted with a discriminatory purpose," see p. 45b, *infra*; and (9) the Appellees conceded "that the

thirteen contested annexations were not effected out of discriminatory purpose," see p. 49b, *infra*.

This Court is the only forum available to Appellants for plenary review of the action of the court below. This fact, the findings made below, and the national significance of the questions raised by these findings argue strongly for a determination by the Court to note probable jurisdiction.

THE QUESTIONS ARE SUBSTANTIAL

This small Georgia city and two of its citizens seek to raise before this Court novel and important statutory and constitutional issues concerning the Act. The political institutions and racial climate of Rome have, as a result of this litigation, come under close scrutiny from the United States District Court for the District of Columbia, and its record in the area of purposeful discrimination has emerged unscathed. Yet, Rome continues to be subject to extraordinary judicial and administrative procedures directed at political subdivisions which have permitted and even condoned purposeful racial discrimination. Rome is not such a political subdivision; it has proven this to the satisfaction of the court below. The major questions presented by this case ask whether Rome and similar political subdivisions should be subject to the provisions of the Act, or whether they should be free to order their own affairs within constitutional limitations.

1. Electoral Changes And Annexations Enacted Without Discriminatory Purpose Are Not Prohibited By Section 5 Of The Act.

Section 5 of the Act provides that, in order to obtain approval by the District Court for the District of Columbia or preclearance by the Attorney General of

electoral changes or annexations, a covered jurisdiction must show that such changes or annexations do "not have the purpose *and* will not have the effect of denying or abridging the right to vote on account of race or color . . . ." See pp. 6-7c, *infra* (emphasis supplied). The statutory language leaves open the question of whether a covered jurisdiction must demonstrate that a proposed change is free of racially discriminatory purpose *and* effect, or whether a showing with respect to either is sufficient. This Court has never clarified this important rule of construction. *Beer* v. *United States*, 425 U.S. 130, 148 n.4 (1976) (MARSHALL, J., dissenting).

Even though the proper construction of Section 5 has never been clearly determined, the court below construed Section 5 to outlaw voting changes discriminatory in effect only because "Congress can be said to have instructed the courts that the existence of racially disproportionate impact raises an irrebuttable presumption of invidious purpose," see p. 36b, *infra*. See also p. 37b, *infra*. Appellants submit that to remain within constitutional limitations, the threshold question must be: Is there "purpose?" If the answer is clearly yes or clearly no, then the examination ends. If the answer is not clear, then "effect" should be examined to determine if it calls for an inference of "purpose." Such a construction is consistent with a proper view of the reach of the Fifteenth Amendment and the power of Congress under Section 2 thereof.[6]

Not only did the court below interpret the content of Section 5 in a manner inconsistent with constitutional limitations, but it also mistakenly held that Appellants

[6] See pp. 18-22, *infra*.

failed to sustain their burden of showing the nondiscriminatory effect of the electoral changes and annexations in question because of the alleged existence of racial bloc voting.[7] From that finding, the court

[7] The court below noted that a statistical demonstration of the existence *vel non* of racial bloc voting in Rome was impossible. In finding its existence, the court relied upon three "strands of evidence," see p. 13b, *infra*. First, while recognizing that the opinion testimony of black witnesses and white witnesses differed regarding the issue of racial bloc voting, the court dismissed the testimony of white witnesses as that of "interested witnesses," see p. 12b, *infra*, relying upon an isolated quotation from City of Richmond v. United States, 422 U.S. 358, 377 (1975), and discounting important *dicta* which resulted in remand of the proceedings. *Id.* at 377.

Second, the court relied upon the unsuccessful campaign for the Board of Education in 1970 by Reverend Clyde Hill, a black candidate, although the court conceded that "Reverend Hill did receive a sizable number of white votes," see p. 12b, *infra*. Reverend Hill received 45% of the votes cast in the run-off election, although only 15% of the registered voters were black. Appellants contend that the Hill campaign not only does not support a finding of racial bloc voting, but, indeed, negates it.

Third, the court related the testimony of Dr. James W. Loewen, a political sociologist, who testified as an expert witness that racial bloc voting existed in Floyd County (not the City of Rome) during the 1968 Democratic United States Senate Primary between Herman Talmadge and Maynard Jackson. This testimony was expressly relied upon notwithstanding the facts that (1) the expert was uncertain of the identity of the incumbent in the Talmadge-Jackson election, although he admitted incumbency was an important consideration; (2) Senator Talmadge had served as a Senator for 12 years at the time of the 1968 election, and Mr. Jackson, now the Mayor of Atlanta, was making his first bid for public office; and (3) the testimony concerned an election for national office that occurred 10 years prior to the decision of the court below.

Appellants strenuously objected to the testimony of Dr. Loewen (Response of Plaintiffs to the Defendants' Motion for Summary Judgment, at 19-22, City of Rome v. United States, No. 77-0797 (D.D.C. April 9, 1979)); nevertheless, the court relied upon it to

concluded that the change from plurality to majority elections and the annexation of certain geographically contiguous areas had a discriminatory effect. However, the court's conclusion fails to follow principles repeatedly established by this Court.

The court below rightly concluded that neither the electoral changes nor the annexations had a discriminatory purpose. It also correctly found that the factors traditionally deemed indicative of the dilution of black voting strength do not exist in Rome. *See White* v. *Regester,* 412 U.S. 755 (1973); *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971); *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976).

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support an inference of racial bloc voting in Rome as of 1978. Such reliance was clearly inconsistent with the manner in which another three-judge court treated the testimony of the same witness in another Section 5 case. Charlton County Board of Education v. United States, No. 78-0564 (D.D.C. Nov. 1, 1978).

In addition to the foregoing factors, the court cited the failure of any black person to be elected to the City Commission or the Board of Education and the apparent political apathy on the part of black citizens as further support for its finding of discriminatory effect, see pp. 9-10b, *infra*. In so doing, the court ignored the admonitions of this Court that mere failure at the polls is not evidence of the dilution of black voting rights. See, *e.g.*, Whitcomb v. Chavis, 403 U.S. 124, 153 (1971); United Jewish Organizations v. Carey, 430 U.S. 144, 166 (1977).

The court below also concluded that "the annexations in question significantly alter the racial balance in Rome," see p. 53b, *infra*, and that the annexations, thus, had a discriminatory effect. In fact, the annexations changed the proportion of black registered voters from 15.5% to 15.2%. This holding is patently contrary to the observation in City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973) as to the impact of the Act upon annexations, which observation was expressly approved in City of Richmond v. United States, *supra*, at 368-369 (1975).

Finally, the court noted that "[i]n Rome politics, the black community, if it chooses to vote as a group, can probably determine the outcome of many if not most contests." Even in the face of these findings, the court held: "On the other hand, most black voters would prefer to have a black official representing their interests. Yet there has never been a black elected to political office in the City of Rome." (footnotes omitted) See p. 8b, *infra*.

Implicit in this holding is the proposition that, contrary to the undisputed record here, white officials represent their race and not the electorate as a whole and cannot represent black citizens;[8] however, this Court has ruled differently in *Dallas County* v. *Reese,* 421 U.S. 477 (1975) and *Dusch* v. *Davis,* 387 U.S. 112 (1967). *Accord, Vollin* v. *Kimbel,* 519 F.2d 790, 791 (4th Cir. 1975), *cert. denied,* 423 U.S. 936 (1975). These holdings are consistent with the principle that no minority group has a federal right to elect minority officials "in proportion to its voting potential." *Beer* v. *United States,* 425 U.S. 130, 136 n.8 (1976); *White* v. *Regester, supra* at 765; *Whitcomb* v. *Chavis, supra* at 153.

Clearly, preclearance of Rome's electoral changes has been refused because of an assumption, by the court below, of the existence of racially polarized voting, contrary to *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 166-167 (1977). The necessary result of the court's holding is to require that any change in Rome's electoral system must be structured so as to assure the

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[8] The court has effectively created, in this regard, still *another* irrebuttable presumption, see p. 10, *infra*, making covered jurisdictions' burden of proof insurmountable.

election of black officials, contrary to *Whitcomb* v. *Chavis, supra* at 149, 153 and *White* v. *Regester, supra* at 765-766.

If the decision of the court below receives the imprimatur of this Court, then the concept of political equality for racial and ethnic groups will have been radically redefined. Indeed, the Voting Rights Act will have "oddly evolved"[9] into a federal guaranty of a right to maximum political effectiveness, or, indeed, a *quota* of political success. The "effect" proscribed by Section 5 will be deemed to be the disproportionate *result* of political processes rather than disproportionate *access* to those processes. *Chavis, Regester, United Jewish Organizations, Dusch* and *Dallas County* will be overruled *sub silentio.*

2. Municipalities Located In States Covered By The Provisions Of The Voting Rights Act Can Independently Bailout From The Coverage Of The Act.

"The issue of whether municipalities in covered states may independently seek to bail-out [sic] is apparently one of first impression." See pp. 18-19b, *infra.* Although the court below acknowledged this fact and conceded the "abstract force" of Appellants' approach, see p. 20b, *infra,* it refused to use abstract "logic as a means of subverting congressional intent," see p. 20b, *infra.* The ruling below was said to be based upon the reasoning of *United States* v. *Board of Commissioners of Sheffield,* 435 U.S. 110 (1978), but the court rejected "any logical inference that might be drawn" from that

[9] A. Thernstrom, *The odd evolution of the Voting Rights Act,* THE PUBLIC INTEREST, Spring 1979, at 49 (hereinafter referred to as "Thernstrom").

case which supports Appellants' position. See 23b, *infra.*

This question is not only novel but also of great legal and practical significance. Resolution of the issue has national importance far beyond the boundaries of the City of Rome, for Section 5 "applies to all entities having power over any aspect of the electoral process within designated jurisdictions," *Sheffield, supra* at 117-135, and even to governmental units with no authority over any electoral process, *Dougherty County Board of Education* v. *White,* —— U.S. ——, 99 S.Ct. 368 (1978). The holding below with respect to bailout, if affirmed, will mean that numerous cities, towns and local boards, which have for many years performed commendably in providing access to their political processes to all citizens, will not have even the opportunity to cleanse themselves of the stigma, frustration and expense of Section 5.[10]

The relevant provision of the Act, 42 U.S.C. §1973b(a), as amended, is set forth at pp. 1-3c, *infra.* The Report of the House Judiciary Committee on the Voting Rights Act of 1965 noted that this provision was designed to provide relief to covered political subdivisions where there has been "no racial discrimination violating the Fifteenth Amendment." The Committee noted further that this "provides assurances that no . . . subdivision will be treated unfairly and that the suppression of tests and devices will be applied only to areas where it is necessary to enforce the

[10] "Bailout" has been recognized as an amelioration of the severity of the Section 5 preclearance requirement, Briscoe v. Bell, 432 U.S. 404 (1978), and thus necessary to the constitutional underpinnings of the Act. *See* South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966).

rights guaranteed under the Fifteenth Amendment." H. R. Rep. No. 439, 89th Cong. 1st Sess. 14-15 (June 1, 1965).

In *Sheffield,* this Court ruled that cities such as Rome, which do not register voters, are nonetheless "political subdivisions" within the meaning of the Act and are subject to its "preclearance" requirements. Since the City of Rome is now subject to Section 5, it must necessarily have available to it the remedies of Section 4, under principles of fundamental fairness, rules of statutory construction, and, most importantly, the language of *Sheffield.*

The language of *Sheffield* seems to be developed, in part, from the comment of Mr. Justice Harlan, concurring in part and dissenting in part, in *Allen* v. *State Board of Elections,* 393 U.S. 544, 584 (1969), that Section 5 "is clearly designed to *march in lock step* with § 4—the two sections cannot be understood apart from one another" (emphasis supplied). True to this "lock step," the City of Rome must now be considered as a "political subdivision" under Section 4(a), as well as Section 5, and be allowed to bailout.

The exhaustive textual and historical analysis in *Sheffield* made no attempt to distinguish the internal aspects of Section 4(a). In fact, it was stated in the context of refuting the district court's position as to the scope of Section 5, that Section 4(a) "clearly applies to all political units within covered jurisdictions . . . ." *Sheffield, supra* at 127 n.14. Mr. Justice Powell concurred in part and observed that Section 5 treats "the governmental units . . . within a designated State or political subdivision as the equivalent of the State or political subdivision." *Id.* at 140.

The opinion in *Sheffield* twice refers to the "textual interrelationship between Section 4(a) and Section 5." *Id.* at 126, 128. The opinion dismisses the slight linguistic differences between Sections 4 and 5 and determines that "the actual terms of Section 5 suggest that its coverage is to be coterminous with Section 4 (a)'s." *Id.* at 126. The Court's opinion does not mention the "bailout sentence" of Section 4(a) specifically, but its exhaustive treatment of the subject compels the conclusion that if any such difference in treatment could rightfully be developed, it would have been set forth. This is especially true in light of the fact that the United States made the Court aware of this position in its *Sheffield* brief. *Brief for the United States* at 25, *United States* v. *Board of Commissioners of Sheffield,* 435 U.S. 110 (1978). *See Farmers' Loan & Trust Co.* v. *United States,* 9 F.2d 688, 689 (S.D.N.Y. 1925).

The importance of a definitive statement from this Court as to the availability of the Section 4(a) bailout remedy to a municipality such as Rome cannot be underestimated. Although the logic of *Sheffield* clearly requires such a remedy, the district court which has exclusive jurisdiction over its availability has rejected this logic in favor of its interpretation of legislative history and congressional intent.[11]

It was established as a matter of fact by the three-judge court below that "no literacy test or other device

[11] The practice of resorting to legislative history in instances in which statutory language is itself clear was expressly rejected by this Court as a canon of construction in Ex parte Collett, 337 U.S. 55, 61 (1949). *See also* Hutto v. Finney, —— U.S. ——, 98 S.Ct. 2565, 2582 (1978) (POWELL, J., and BURGER, C.J., concurring in part and dissenting in part).

has been employed in Rome as a prerequisite to voter registration during the past seventeen years," see p. 5b, *infra*. The City of Rome, and jurisdictions like it, should be entitled to the fair treatment originally intended by the framers of the Act, and in view of the finding by the court below, should be allowed to bailout.

3. Congress Is Not Empowered, Pursuant To Section 2 Of The Fifteenth Amendment Of The Constitution, To Prohibit Electoral Changes And Annexations Found To Be Enacted Without Discriminatory Purpose.

This case raises two fundamental, interrelated constitutional issues of contemporary significance that deserve the attention of this Court. First, does the Fifteenth Amendment proscribe only purposeful discrimination? Second, can the Congress, pursuant to its enforcement powers, proscribe discrimination not prohibited by the substantive terms of the Amendment?

Past decisions of this Court, *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) and *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), suggest that the Fifteenth Amendment prohibits only intentional racial discrimination, and the United States Court of Appeals for the Fifth Circuit has held directly that "a showing of improper motivation or purpose is necessary to establish a valid cause of action under the fifteenth amendment [sic]." *Nevett* v. *Sides*, 571 F.2d 209, 221 (5th Cir. 1978), *pet. for cert. filed*, 47 U.S.L.W. 3283 (U.S. Oct. 24, 1978) (No. 78-492). (*Nevett* was a companion case to *Bolden* v. *City of Mobile*, 571 F.2d 238 (5th Cir. 1978), *prob. juris. noted*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978) (No. 77-1844), which is presently before this Court for decision.[12]) The Fifth Circuit based its decision, in part, upon *Washington* v. *Davis*, 426 U.S. 229 (1976) and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), in which this Court established that discriminatory intent is an essential element of a Fourteenth Amendment equal protection claim. Indeed, this Court's historical treatment of the Civil War Amendments indicates that discriminatory intent is a general requirement for such a claim. *See Oregon* v. *Mitchell*, 400 U.S. 112, 126-131 (1970); *Ex parte Virginia*, 100 U.S. 339, 344-345 (1980); *The Slaughter-House Cases*, 83 U.S. 36, 68-72 (1873).

It is essential to the orderly development of doctrine under both the Fourteenth and Fifteenth Amendments that this question be definitively answered. For example, based upon its understanding that discriminatory intent is required for both Fourteenth *and* Fifteenth Amendment claims, the *Nevett* court has characterized the well-known "*Zimmer* standards" for determining the existence of voting dilution, *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), as criteria for raising "an inference of intent" necessary in order to sustain a claim under the Fourteenth Amendment, *Nevett, supra* at 217.

Significantly, the three-judge court below, while conceding that discriminatory intent was probably essential to a Fourteenth Amendment claim, nevertheless

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[12] It is noted, however, that the Appellants in *Mobile* contend, procedurally, that the question of a requirement of purpose under the Fifteenth Amendment is not properly before the Court. Reply Brief for Appellants at 1-2, City of Mobile v. Bolden, *prob. juris. noted*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978) (No. 77-1844).

concluded that this Court "has never explicitly addressed the question" of whether the Fifteenth Amendment reaches only purposeful discrimination, see p. 33b, *infra*. This issue was described by Judge McGowan as "an important and unsettled constitutional question." See p. 33b, *infra*.

If the Fifteenth Amendment proscribes only purposeful discrimination, as Appellants believe, the power of Congress to affect the electoral processes of innocent subdivisions is drawn into question. Previous decisions of this Court with respect to the Act cast little light on this issue. In *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966) this Court upheld the power of Congress to enforce the constitutional prohibition of racial discrimination in voting through the enactment of the Voting Rights Act. The Court's understanding of the term "racial discrimination in voting" is illustrated, however, by the examples given by the Court of abuses which fostered the legislation, including "[g]randfather clauses . . . . procedural hurdles . . . . white primar[ies] . . . . improper challenges . . . . racial gerrymandering . . . . [and] [f]inally discriminatory application of voting tests. . . ." *Id.* at 311, 312 (citations omitted). At another point, the Court characterized the problem as the creation by the covered states of "strategem[s] of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.* at 335. Indeed, it was such exceptional conditions which caused the Court to "justify legislative measures not otherwise appropriate." *Id.* at 334.

In *Katzenbach* v. *Morgan*, 384 U.S. 641 (1965), Mr. Justice Brennan suggested that extensive power re-

sides in the Congress to define the substance of the Amendments by remedial legislation—even though that definition is different from the rulings of this Court. *Id.* at 653-656. Mr. Justice Harlan dissented from this position stating that the paramount role of the judicial branch should be recognized, and wrote that, "[w]ere the rule otherwise, Congress would be able to qualify this Court's constitutional decisions under the Fourteenth and Fifteenth Amendments, let alone those under other provisions of the Constitution, by resorting to Congressional power under the Necessary and Proper Clause." *Id.* at 667-668. Justice Harlan's view in various forms, appears to have attracted at least four other members of this Court in the case of *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), in which he restated his earlier position, *id.* at 204-207, and in which Justice Stewart, who was joined by the Chief Justice and Justice Blackmun, wrote a concurring opinion noting and elaborating on his concurrence with Justice Harlan's view. *Id.* at 281. Finally Justice Black, in describing limitations on Congressional authority, stated that "Congress may only 'enforce' the provisions of the Amendments." *Id.* at 128. Thus, *Katzenbach* v. *Morgan* and *Oregon* v. *Mitchell* are in conflict regarding the scope of Congressional authority to enforce the Civil War Amendments, and the fundamental questions raised by this conflict merit clarification by the Court.

A recent decision of this Court outlining the reach of the Fourteenth Amendment casts serious doubt as to the power of Congress to create a more stringent standard for enforcement of a constitutional prohibition than that embodied in the prohibition itself. In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976) it was

held that Section 5 of the Fourteenth Amendment grants Congress the power to "enforce 'by appropriate legislation' the *substantive provisions* of the Fourteenth Amendment...." (emphasis supplied). Implicit in the *Fitzpatrick* holding is the proposition that Congressional power is limited by the substantive content of the Civil War Amendments. Because the Fifteenth Amendment prohibits only electoral procedures which involve some degree of purposeful discrimination, Congress lacks power under Section 2 of the Amendment to prohibit electoral procedures which are adopted without discriminatory purpose.

The court below held that Congress was within its power to outlaw "voting changes discriminatory in effect only," see p. 34b, *infra,* because they raise an "inference of purpose." See pp. 34-35b, *infra.* The court proceeded to hold that Congress, through the enactment of Section 5, instructed the courts that the existence of racially disproportionate impact raises an "irrebuttable presumption" of invidious purpose. See p. 36b, *infra.* Whether couched in terms of evidentiary rules or constitutional doctrine, the effect of such a ruling is to sanction the prohibition of electoral changes solely on the ground of disproportionate racial impact, and thus to recognize the power of Congress to act beyond the substantive content of the supporting amendment. Appellants respectfully submit such a holding merits plenary review by this Court.

4. Section 5 Of The Voting Rights Act Intrudes Upon Basic Concepts Of Federalism And Rights Guaranteed By The First, Fifth, Ninth And Tenth Amendments Of The Constitution.

Appellants challenge not the Voting Rights Act itself, whose commendable purposes have largely been

realized, but only Section 5 thereof. This is the first case since 1966 in which the constitutionality of Section 5, both facially and as applied, has been placed squarely before this Court, based upon a record which includes samples of actual experience under this controversial provision.[13]

South Carolina v. *Katzenbach, supra,* established the basic constitutional test against which legislation such as Section 5 must be measured: "[h]as Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" 383 U.S. at 324. This test was refined by Mr. Justice Black in *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), when he established three criteria for evaluating legislation enacted by Congress pursuant to its powers under Section 2 of the Fifteenth Amendment, including the recognition that Congress may not strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority. *Id.* at 128.[14] It is in the context of the basic test established by Mr. Chief Justice Warren, as refined by Mr. Justice Black,

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[13] A Texas study introduced into evidence below catalogues that State's experience with Section 5. Report of the Committee on Elections, Texas House of Representatives, 64th Legislature (Nov. 12, 1976) [Second Request by Plaintiffs for Admission of Facts and Genuineness of Documents, Exhibit "B", City of Rome v. United States, No. 77-0797 (D.D.C. April 9, 1979)].

[14] Another criterion was that Congress may not by legislation repeal other provisions of the Constitution. Oregon v. Mitchell, 400 U.S. 112, 128 (1970). In the context of the case at bar, the "other provisions of the Constitution" are not only the Federalism principles of Article IV, Section 4 and the Tenth Amendment, see pp. 23-28, *infra,* but also the First, Fifth, Ninth and Tenth Amendments, as protections of the rights of the citizens of Rome. See pp. 29-35, *infra.*

that Appellants ask this Court to review the constitutionality of Section 5.

A. Principles of Federalism

Mr. Justice Black's dissents in *Perkins* v. *Matthews,* 400 U.S. 379, 401-407 (1971); *Allen* v. *State Board of Elections,* 393 U.S. 544, 595-597 (1969); and *South Carolina* v. *Katzenbach, supra* at 359-361, recognized that Section 5 effectively gives federal officials a veto power over state and local laws, directly contrary to Article IV, Section 4 of the Constitution, which commands: "The United States shall guarantee to every State in this Union a Republican Form of Government." The implementation of Section 5 directly violates the Guarantee Clause by creating two functionally dissimilar sets of states within the Union—one self-determined and one determined either by the Attorney General of the United States or the District Court for the District of Columbia.

A recent case has acknowledged that while state sovereignty has been diminished in some areas by the exercise of congressional authority, "it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws." *Maryland* v. *Environmental Protection Agency,* 503 F.2d 215, 225 (4th Cir. 1975), *vacated and rem'd per curiam sub nom. Environmental Protection Agency* v. *Brown,* 431 U.S. 99 (1977).

The ability of the Attorney General to render laws ineffective by refusing to preclear them is clearly a veto power. Such treatment of the laws of States and cities is hardly consistent with the Guarantee Clause. It is similar to the type of treatment recognized in

Dawson v. *Vance,* 329 F.Supp. 1320, 1326 (S.D. Tex. 1971) as "opposite" to the Guarantee Clause: "to lightly subject state statutes . . . to precipitate and peremptory federal court equitable review absent extraordinary circumstances." Under Section 5, however, review is not even judicial; it is administrative. Indeed, one Justice of this Court has suggested that Section 5, which should be treated with "solemnity," may have been reduced to "a trivial, though burdensome, administrative provision." *United States* v. *Board of Commissioners of Sheffield,* 435 U.S. 110, 148 n. 11 (1978) (STEVENS, J., dissenting). The administrative supremacy that has been given to the Attorney General, or actually to his staff, is antithetical to the principles of Federalism embodied in the Guarantee Clause.

This Court gave contemporary significance to the principles of Federalism in *National League of Cities* v. *Usery,* 426 U.S. 833, 851 (1976),[15] where it was held

[15] Other recent cases have addressed the concept of Federalism. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) and Hutto v. Finney, —— U.S. ——, 98 S.Ct. 2565 (1978) recognize the abrogation of the States' Eleventh Amendment immunity by the Fourteenth Amendment; however, those cases involved mere monetary recovery against States. Such an exercise of Congressional power nowhere approaches the significant and undeniable encroachment, indeed, *veto power* over, the functions most "essential to the separate and independent existence of the States and their governments"—elections. Oregon v. Mitchell, 400 U.S. 112, 125 (1970). Under another recent authority Appellants submit that a provision such as Section 5 violates not merely a particular provision of the Constitution such as the Guarantee Clause or the Tenth Amendment, but the entire federal structure of the Constitution: "Congressional action which treats the states in a manner inconsistent with their constitutionally recognized independent status, therefore, should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant

that the Federal Government may not impair the exercise by the States of "integral government functions" necessary to their "separate and independent existence." The Court recognized that the rights of States *qua* States are affirmative limitations upon the powers of the central government in the same manner as the limitations imposed by the individual rights amendments to the Constitution. *Id.* at 845. Furthermore, as the Court's opinion noted, these limitations extend to the rights of cities. *Id.* at 855-856 n. 20.

Clearly, an attribute of the sovereignty of a State, and its political subdivisions, is the conduct of elections and enactment of laws, especially where no discriminatory intent is present. Indeed, this Court has established:

> No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices.

Oregon v. *Mitchell*, 400 U.S. 112, 125 (1970).

The tests of constitutional latitude in the Tenth Amendment context were suggested by Mr. Justice Rehnquist in *National League of Cities*, wherein he noted that the means selected must be "carefully drafted so as not to interfere with the State's freedom beyond a very limited, specific period of time." 426 U.S. at 853. In the face of the statistics generated by the administration of Section 5, now compiled and recognized by this Court in *United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110, 147 (1978)

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of authority, but because it would be contrary to the structural assumption of the Constitution as a whole." L. TRIBE, A TREATISE ON AMERICAN CONSTITUTIONAL LAW 301 (1978).

(STEVENS, J., dissenting) and *Berry* v. *Doles*, 438 U.S. 190, 201 n.6 (1978) (POWELL, J., concurring), it cannot possibly be said that the means selected to enforce the rights guaranteed by the Fifteenth Amendment were "carefully drafted" so as not to interfere with the States' freedom to conduct elections and enact laws. The Attorney General has objected to submissions in only a very few instances,[16] and yet every municipality, indeed, even minor political units, including those having no authority over any electoral system, in every covered state, are made to endure the protraction and frustration [17] of the Section 5 process.

One justification previously given for the appropriateness of the Section 5 remedy was that it contained an administrative alternative which was believed to be a "rapid method of rendering a new state election law enforceable," *Allen* v. *State Board of Elections*, 393 U.S. 544, 549 (1969); *Morris* v. *Gressette*, 432 U.S. 491 (1977); see pp. 4-7a, 44b, *infra*. Therefore, Section 5 should be analyzed by this Court to determine whether it has functioned in the intended manner. Appellants submit that realistic analysis of the day-to-day operation of Section 5 will reveal that it does not operate in this manner.[18]

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[16] According to the latest published figures, the rate of objection to changes is 1.51%. In 1978, the rate was 0.8%. It would appear that the administrative preclearance alternative, having become a mere "inventory of voting procedures," has paradoxically become a "dead letter." Georgia v. United States, 411 U.S. 526, 531, 538 (1973).

[17] Even more frustrating is the holding of the court below that a city free of discriminatory practices may not bailout from this requirement, see p. 23b, *infra*.

[18] The statutory language of Section 5 and the administrative regulations of the Attorney General require the Attorney General

The review process of the Attorney General is especially objectionable when measured by the limitations on the power of Congress set forth by Justice Black in *Oregon* v. *Mitchell, supra.* There is no provision for a hearing; there are no written standards of review; there is a confidential file unavailable to submitting jurisdictions; there is no requirement of findings of fact; and there is no necessity of finding dilutive factors. Indeed, there is not even a necessity to reach conclusions that a change is discriminatory. As Justices White, Powell and Rehnquist observed, in dissent, in *Georgia* v. *United States,* 411 U.S. 526, 543-544 (1973): "[W]hy should the State be forced to shoulder that burden where its proposed change is so colorless that the country's highest legal officer professes his inability to make up his mind as to its legality?" Notwithstanding the breadth of this power, the administrative discretion of the Attorney General is not subject to judicial review, *Morris* v. *Gressette,* 432 U.S. 491, 507 (1977). Indeed, according to the court below,

to act on a submission within 60 days; however, "Catch 22's" abound. The 60 days does not begin until the Justice Department has received a "complete" submission, and "completeness" is wholly in the Department's unreviewable discretion; the 60 days does not begin until the submission is received by the Justice Department; the Justice Department may wait until the sixtieth day to mail an objection, and if the objection falls on a holiday, the Department has until the next working day. Declination of a submission as inadequate (and the consequent suspension of the 60-day limitation) is "frequent." *Hearings on the Extension of the Voting Rights Act before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives,* 94th Cong., 1st Sess., Ser. 1, pt. 1 at 302, (hereinafter referred to as *"Hearings"*). In short, the 60-day time frame is seldom, if ever, adhered to.

even the constitutionality of his actions is not subject to judicial review, see p. 6a, *infra,* note 3.[19]

B. Rights of Private Appellants

Because scheduled elections for local offices in the City of Rome have not been held since 1974,[20] Appel-

[19] Count V of Appellants' complaint sought review by the court below of not only the reasonableness or legality of the Attorney General's actions and nonactions in his administration of Section 5 with respect to the City of Rome, but also the *constitutionality* of such practices. The court below, see pp. 6-7a, *infra,* held this issue to be non-reviewable, and Appellants submit that, in so holding, a singular incidence of administrative supremacy has been created in the Attorney General. Language in Georgia v. United States, 411 U.S. 526 (1973) implies that the actual conduct of the Attorney General is, or should be, reviewable. *Id.* at 541 n.13. The court below observed that a submitting jurisdiction can obtain full and adequate redress in a *de novo* proceeding. Appellants submit that the delay in the holding of democratic elections and the expense attendant to a *de novo* proceeding such as this would be avoided if the Attorney General were required in this and similar cases to apply constitutional standards. The ultimate question of constitutionality should always be entitled to judicial review. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936); Heikkila v. Barber, 345 U.S. 229 (1953).

[20] One of the 1966 laws enacting electoral changes, the reduction of wards from nine to three, see pp. 42-43b, *infra,* was precleared by the Attorney General and therefore effectively amended Rome's charter. When this *effective* provision (without the other, *ineffective* changes) is inserted into the existing charter (pre-November 1964 laws), the result is to provide for a total of three commissioners, one from each of the three wards, rather than nine commissioners. The new provision renders the city commission, under the Charter with its existing provisions (such as the requirement of five for a quorum), powerless as a government. Moreover, when the Attorney General objected to the changes, the city boards were already operating on a staggered term basis. Any elections under the "old law" would necessarily cut short some existing terms. In such a situation, the State Constitution would require not only legislative action but a popular referendum as well, and each of

lants Hamler and Hunter, as private parties, challenge Section 5 as violative of their rights of political participation. This case constitutes the first such challenge before this Court; it presents for resolution a conflict between an arguable Fifteenth Amendment right and rights of political participation under the First, Fifth, Ninth and Tenth Amendments.

In addressing this issue, the court below found that the freezing of the electoral process was as much the result of actions by Rome officials as of the Voting Rights Act, see p. 42b, *infra*;[21] that, pretermitting the

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these steps would be subject to preclearance. Elections and election results in such a chaotic posture are impossible. See Plaintiffs' Post-Argument Brief at 1-2, City of Rome v. United States, No. 77-0797 (D.D.C. April 9, 1979).

[21] In spite of the fact that the infeasibility of elections in Rome is "technical," see p. 43b, *infra*, it is no less real. Such a characterization by the court below, together with the finding that the freezing of elections was partially caused by the officials of the City of Rome, Appellants respectfully submit, demonstrates several inevitable results of the enforcement concept of Section 5: a failure to appreciate the sanctity and seriousness of state laws; a failure to acknowledge the "odd evolution" of Section 5 and the history of its enforcement; a failure to recognize the practicalities, hardships, and most important, time consumption of changing State laws, and the understandable bewilderment of all citizens of localities like Rome at not having elections. *See* Thernstrom, *supra*, note 9.

Many of these difficulties arose because Section 5 "remained practically dormant for several years," Hearings, *supra*, note 18, at 1480. It had barely begun to be implemented in 1969 and 1970. *Id.* at 169, 1480. "The Department of Justice did not adopt regulations implementing § 5's preclearance provisions until September, 1971, six years after the passage of the Act and nearly two years after this Court's decision in *Allen*, [393 U.S. 544 (1969)]" United States v. Board of Commissioners of Sheffield, 435 U.S. 110, 148 (1978) (STEVENS, J., dissenting). *See also* Berry v. Doles, 438 U.S. 190, 197 n.1 (1978) (POWELL, J., concurring).

question of whether the right to vote in a municipal election is a fundamental right, Section 5 is justifiable in the interest "of enforcing the Fifteenth Amendment," see p. 43b, *infra;* and that "[i]n any event, a five-year suspension of elections during § 5 litigation is by no means unusual," see p. 41b, *infra,* n.77.

(1) *Rights Protected By The First Amendment.*

The election of Appellant Hunter, for example, may not be of constitutional magnitude; however, the constitutional violations which prevent such an election are worthy of attention by this Court, because they amount to a federal administrative veto of state and local laws. With respect to such state and local election laws, this Court has consistently, and for decades, recognized and protected the continuing availability of the franchise and political participation for all citizens. *See Illinois State Board of Elections* v. *Socialist Workers Party,* 47 U.S.L.W. 4197 (U.S. Feb. 22, 1979) (No. 77-1248); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Ex parte Siebold,* 100 U.S. 371 (1880). *See also Buckley* v. *Valeo,* 424 U.S. 1 (1976); *Elrod* v. *Burns,* 427 U.S. 437 (1976).

Although the right to vote, as distinguished from a right not to be denied the vote for improper reasons, does not appear on the face of the Constitution, this Court has viewed the right as fundamental and not subject to abolition. *See* L. Henkin, *Constitutional Rights & Human Rights,* 13 Harv. C.R.-C.L. L. Rev. 593, 610 n. 61 (1978).

The framers of the Constitution never contemplated that Congress, much less the Attorney General, would establish or control electoral systems even for a "village alderman," *Oregon* v. *Mitchell,* 400 U.S. 112, 125 (1970).[22] Even more foreign to the framers would have been the suggestion that local elections would be "frozen" by a federal veto of local election laws, especially in the absence of a constitutional violation.

As Appellants previously noted, the court below made the remarkable observation that "suspension of elections during § 5 litigation is by no means unusual," see p. 41b, *infra,* n.77. The court pointed out that, at the time of remand by this Court, in cases involving the respective cities, New Orleans' elections had been frozen for six years and Richmond's elections had been frozen for five years.[23]

Recognizing the importance of the timeliness of political speech, this Court, in *Elrod* v. *Burns, supra* at 373, reaffirmed: "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Moreover, "[d]efer-

[22] Section 5 applies to minor changes of minor political units. *See* p. 14-15, *infra.* The intention of Congress was that Section 5 be given the "broadest possible scope." Allen v. State Board of Elections, 393 U.S. 544, 566-567 (1969). This breadth constitutes, in the context of First Amendment freedoms, *overbreadth.* See Elrod v. Burns, 427 U.S. 347, 362-363 (1976); First National Bank v. Bellotti, 435 U.S. 765, 786 (1978). Section 5 fails in the requirement that it be "closely drawn to avoid unnecessary abridgement," Buckley v. Valeo, 424 U.S. 1, 25 (1976).

[23] This result of Section 5 epitomizes the intrusiveness of the remedy. This case, which has established in the record below a sampling of the day-to-day operation of Section 5, may be the "difficult to imagine" one "having a greater potential impact on our federal system" than San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 44 (1973).

ment of a right, especially one as sensitive and essential as the exercise of the first duty to citizenship, can be tantamount to its denial." *Rosario* v. *Rockefeller,* 410 U.S. 752, 766 (1973) (POWELL, J., dissenting).

In *Buckley* v. *Valeo, supra* at 48-49, it was said, "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." Furthermore, *First National Bank* v. *Bellotti,* 435 U.S. 765, 802 (1978) (BURGER, C.J., concurring) teaches us that the "First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms." All the citizens of Rome desire that their freedoms be restored.

(2) *Rights Protected By The Fifth Amendment.*

First National Bank v. *Bellotti, supra* at 780, recently affirmed the principle that: "Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause . . . ."

It requires no citation of authority to establish that due process requires application of objective standards and a hearing before property or liberty may be deprived. However, a review of the text of Section 5 reveals no provision for a hearing nor any standards by which the electoral system of the City of Rome is to be judged by the Attorney General. The Attorney General's regulations similarly provide for no hearing.

The "objection letter" of the Assistant Attorney General directed to the electoral changes of Rome

(*Second Supplement to Parties' First Stipulation of Facts,* Exhibit 45, *City of Rome* v. *United States,* No. 77-0797 (D.D.C. April 9, 1979)), typical of such letters, is conclusory only (albeit conclusory of an inability to conclude) and lacks any specific findings of fact or any indication of the sources of information on which the decision was based. The absence of any textual limitation upon the actions of the Attorney General, including the absence of a provision for a hearing, is aggravated by the unavailability of judicial review under *Morris* v. *Gressette,* 432 U.S. 491 (1977). Section 5, an admittedly "severe" remedy, lacks in basic constitutional protections and denies Private Appellants due process of law.

(3) *Rights Reserved To The People Under The Ninth And Tenth Amendments.*

Private Appellants, through the freezing effect of Section 5, have been unable to vote, to express their political beliefs, to engage in political activities, to associate to advance ideas, to support candidates, to be candidates and to defeat candidates. Many of these activities are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934). In Appellants' view these are First Amendment rights guaranteed by the Fifth Amendment against impairment. Even if the rights of the Private Appellants are not "fundamental," they should be deemed "penumbral" rights reserved to the people of Rome and similarly situated cities by the Ninth and Tenth Amendments. Private Appellants argue that, aside from the rights and powers their state and city may retain by virtue of principles of Federalism, they, as individuals,

have suffered the loss of rights guaranteed by the First, Fifth, Ninth and Tenth Amendments.

In *United Public Workers* v. *Mitchell,* 330 U.S. 75, 94-95 (1947), similar contentions were accepted:

> We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment.

All of the citizens of Rome seek to have restored and protected their rights of political participation, not under the Fifteenth Amendment, but under the "other provisions" of the Constitution of the United States. This is especially appropriate where their government has been responsive and free of racial animus.

5. The Electoral Changes and Annexations Presently Before This Court Have Been Precleared By The Attorney General Of The United States.

In light of the burden which would be imposed on covered jurisdictions by the declaratory judgment procedure of Section 5, Congress provided an alternative by requiring the Attorney General to interpose an objection to legislation submitted to him pursuant to the Act sixty days after receipt of such a submission. *Morris* v. *Gressette,* 432 U.S. 491, 495 (1977). Appellants bring before this Court two important issues re-

lating to the function of the Attorney General under Section 5, the resolution of which is essential to the equitable administration of Section 5.

A. Administrative Preclearance of Georgia Election Law

The Georgia Municipal Election Code of 1968, codified as Title 34A of the Code of Georgia of 1933, contains the following three provisions. Georgia Code Ann. § 34A-102 provides that the election code applies to all cities and all city elections. See p. 1d, *infra*. Georgia Code Ann. § 34A-902 provides for numbered posts, identical to the numbered post provisions in the Charter of the City of Rome. See p. 1d, *infra*. Georgia Code Ann. § 34A-1407(a) establishes a majority vote requirement, unless the particular charter of a city, then or in the future, provides for a plurality vote. See pp. 1-2d, *infra*. (As of the effective date of the 1968 Municipal Election Code, April 4, 1968, the Charter of the City of Rome did not provide that a candidate may be nominated or elected by a plurality. Rather, it provided for a majority vote. The Charter also called for numbered posts.) Georgia Code Ann. § 34A-1407 (b) provides for the conduct of run-off elections. See pp. 2-3d, *infra*.

The Georgia Municipal Election Code was submitted by the Attorney General of Georgia to the Attorney General of the United States on May 13, 1968. The submission highlighted the majority vote, run-off election and numbered post provisions of the Code, and the fact that cities in Georgia were *enabled* to establish these provisions. The Attorney General of the United States, in responding to the submission by the Attorney General of Georgia, objected to the use of various features of the 1968 Georgia Municipal Election Code

in certain described jurisdictions. However, with respect to the majority vote, run-off elections and numbered posts, no such reservation was made.[24]

In fulfillment of his statutory duty, the Attorney General must give full consideration, indeed, "the most thoughtful deliberation," *Berry* v. *Doles,* 438 U.S. 190, 201 n.6 (1978) (POWELL, J., concurring), to a complete submission. To the extent that the Attorney General reviewed all portions of the Georgia Municipal Election Code of 1968, as he is required to do, and interposed specific objections to certain portions of the Code and certain municipalities covered by the Code, he necessarily precleared the other provisions of the Code, as well as their applicability to those municipalities with respect to which he did not object.

In another case, Appellee, the United States, asserted with respect to the 1964 Georgia Election Code, applicable to state and county, rather than municipal elections, that the Attorney General did not give specific attention to the numbered posts and majority vote features of that Code. A three-judge court in the United States District Court for the Northern District of Georgia, in an action summarily affirmed by this Court, held that the 1964 Georgia Election Code was properly presented to the Attorney General, and the majority vote and numbered posts provisions were, in fact, precleared. *United States* v. *Georgia,* 351 F.Supp. 444 (N.D.Ga. 1972), *aff'd mem.,* —— U.S. ——, 98 S.Ct.

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[24] Letter of Mr. S. J. Pollak, Assistant Attorney General, to Mr. A. K. Bolton, Attorney General of the State of Georgia (July 15, 1968) [First Request by Plaintiffs for Admissions of Facts and Genuineness of Documents, Exhibit "A," City of Rome v. United States, No. 77-0797 (D.D.C. April 9, 1979)].

2840 (1978). Thus, county governments in Georgia are authorized to utilize these common electoral features.

The court below has created the following anomaly: while counties and the State may utilize numbered posts and majority vote provisions, Georgia cities cannot use identical features because the State of Georgia allegedly did not submit "'in an unambiguous and recordable manner' *all* municipal charter provisions," p. 25b, *infra* (emphasis supplied).

It is also clear that the Municipal Election Code enables Georgia municipalities to utilize these electoral features in the future *and this enablement was itself precleared by the Attorney General.* This Court, in *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636, 637 n.2, 638 n.6 (1976) noted that enabling legislation is not effective where the Attorney General interposes a specific objection. Conversely, where the Attorney General fails to interpose an objection to the enabling features of state legislation, it must be presumed that such enabling legislation stands without objection and is of full force and effect. More recently, the significance of such enabling legislation and its preclearance by the Attorney General is highlighted in *Wise* v. *Lipscomb,* —— U.S. ——, 98 S.Ct. 2493 (1978).

Appellants respectfully submit that the opinion below, in this respect, highlights the immediate "need to bring a measure of common sense" to the application of the Voting Rights Act to the affected jurisdictions. *Berry* v. *Doles,* 438 U.S. 190, 201 (1978) (POWELL, J., concurring).

B. Failure by the Attorney General to Object in a Timely Manner

During the preclearance process, Rome moved for reconsideration of the Attorney General's previous objection to its electoral changes on May 24, 1976, which motion was acknowledged by him. On July 14, 1976, before he had responded and without solicitation, the city supplemented its request with two affidavits which the court recognized were "brief . . . [and] hardly of a nature to impose a significant burden on the Attorney General," see p. 28b, *infra* n.64. The affidavits were not acknowledged. It was not until August 12, 1976, that the Attorney General responded. Rome contended that the statutory sixty-day period began on May 24, the date of the initial request for reconsideration, and that the Attorney General, having failed to respond within the required time, precleared the changes. *Morris* v. *Gressette, supra.* Appellees contended that the period began on July 14, and that the response was thus timely.

The court below found that the sixty-day period in which the Attorney General of the United States is required to respond "commence[s] anew" when he receives even an unsolicited supplement to a submission. See p. 28b, *infra.* Appellants submit that this holding was in error and contrary to the Attorney General's own regulations, 28 C.F.R. §§ 51.3, 51.10(a) and 51.18 (1978).

These regulations, as approved by this Court in *Georgia* v. *United States,* 411 U.S. 526 (1973), provide that the sixty-day period shall commence upon receipt by the Attorney General of a submission which satisfies the requirements of 28 C.F.R. § 51.10(a). Procedures for requesting additional material and for determining the commencement of the sixty-day period

when a submission is inadequate are described in § 51.18, which provides that if a submission does not satisfy the requirements of the Attorney General, he shall request further information and advise the submitting authority that the sixty-day period will not commence until such information is received.

The sixty-day period that runs upon the submission of a request for reconsideration is tolled only, under 28 C.F.R. § 51.18(a), if a submission does not satisfy the requirements of § 51.10(a) and the Attorney General requests further information. It is clear that all submissions by the City of Rome were complete as of the receipt of the request for reconsideration on May 24, 1976. This is established by virtue of the Attorney General's letter of acknowledgment of May 25, 1976. The letter acknowledges that thirteen annexations and the electoral changes were still under consideration, and the record is clear that no determination of inadequacy or further requests for information were made by the Attorney General. The voluntary submission of two supplementary affidavits by the City on July 14, 1976, does not, under the Attorney General's own regulations, toll the sixty-day time period. *See also* 28 C.F.R. § 51.3(d).

Under *Georgia* v. *United States, supra,* the Attorney General is allowed to object "by simply saying that he cannot make up his mind." *Id.* at 545. However, Appellants believe that he must object within sixty days, rather than eighty.

CONCLUSION

For the reasons submitted herein, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 77-0797

CITY OF ROME, BRUCE HAMLER, and H. F. HUNTER,
Plaintiffs,

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL, Attorney General of the United States, and DREW S. DAYS, III, Assistant Attorney General of the United States,
Defendants.

Before McGOWAN, Carl, *Circuit Judge,* GASCH, Oliver, and RICHEY, Charles R., *District Judges.* By Charles R. Richey, *District Judge.*

MEMORANDUM

Filed February 22, 1978

This case, brought under the Voting Rights Act of 1965, 42 U.S.C. §§ 1971 *et seq.,* is presently before the Court on: (1) defendants' renewed motion to dismiss Counts II, IV, and V of the amended complaint herein; (2) defendants' motion for a protective order to prevent the taking of the deposition of Frederick J. McGrath; (3) plaintiffs' motion to compel discovery; (4) plaintiffs' motion for an order that certain facts be taken as established; (5) defendants' motion for an extension of time within which to complete discovery; and (6) the parties' joint motion for an extension of time within which to file summary judgment motions.

I. Defendants' Renewed Motion To Dismiss And The Related Discovery Motions

The initial complaint in this case, filed on May 9, 1977, contained six claims upon which plaintiffs sought relief. Defendants answered on July 12, 1977, and on that same date filed a motion to dismiss three of these claims. The three claims that were the subject of defendants' motion respectively sought declaratory judgments that:

> (1) the City of Rome is not required to obtain preclearance of the electoral changes here in issue because no "test or device" within the meaning of 42 U.S.C. § 1973b had been used in Rome during the 17 years prior to the filing of the instant action "for the purpose or with the effect of denying or abridging the right to vote on account of race or color";
>
> (2) section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is unconstitutional; and
>
> (3) section 5 was applied by the Attorney General of the United States to the City of Rome in an unconstitutional manner.

This Court heard arguments on defendants' motion to dismiss on October 28, 1977; on October 31, 1977, the Court ruled that it would, in the interests of justice, defer ruling on the pending motion to dismiss until plaintiffs had filed their amended complaint and defendants had filed an answer thereto.[1] Thereafter, plaintiffs filed an amended complaint, and defendants, on November 21, 1977, filed the renewed motion to dismiss that is now before the Court. The renewed motion seeks the dismissal of the three claims hereinabove described, respectively termed Counts II, IV, and V of the amended complaint.

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[1] The Court's Order of October 31, 1977, also established a timetable to govern discovery and further filings with the Court.

After defendants filed the renewed motion to dismiss, the parties undertook extensive discovery. Plaintiffs have sought discovery of, *inter alia,* facts related to the claims contested in the pending motion to dismiss. In particular, plaintiffs have propounded interrogatories, requests for admission, and requests for the production of documents that relate to Count V of the amended complaint. In addition, plaintiffs noted the deposition of Frederick J. McGrath, an attorney in the Department of Justice who, at the administrative level, reviewed the City of Rome's application for section 5 preclearance. Apparently this deposition was also intended to discover facts related to Count V.

Based on their contention that this Court lacks subject-matter jurisdiction over Count V (and that Count V should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(1)), defendants refused to answer or produce documents related to Count V. On the same grounds, defendants also opposed the deposition of Mr. McGrath, and they now seek a protective order to block said deposition. Plaintiffs in turn filed a motion to compel answers to all discovery demands they had previously made.

It appears to the Court that it continues to be appropriate and in the interests of justice to defer ruling on defendants' motion to dismiss Counts II and IV of the amended complaint. The Court will consider the parties' respective arguments on these Counts when all discovery is completed and when summary judgment motions, if any, have been filed. However, because the main of the discovery dispute(s) now before the Court is inextricably tied to the dispute with respect to this Court's jurisdiction over Count V, the Court will at this time rule on that aspect of defendants' motion. For the reasons hereinafter stated, the Court will grant defendants' motion to dismiss Count V of the amended complaint.

A. The Attorney General's interposal of an objection to the City of Rome's proposed electoral changes is not subject to judicial review. Accordingly, the Court will dismiss Count V of the Amended Complaint for lack of subject matter jurisdiction.

Plaintiffs allege in Count V that defendants, by interposing an objection to Rome's proposed electoral changes *without* conducting a hearing and *without* making findings, violated article 4, section 4 of, and the first, fifth, ninth, tenth, and fifteenth amendments to, the United States Constitution. Plaintiffs therefore assert that the defendants acted beyond the scope of their authority and that defendants' objection to (i.e., refusal to preclear) the electoral changes here in issue is therefore invalid and without force or effect. Defendants premise their argument for dismissal of this Count on the Supreme Court's recent decisions in *Morris v. Gressette,* 432 U.S. 491 (1977), and in *Briscoe v. Bell,* 432 U.S. 404 (1977), and on the District of Columbia Circuit's recent decision in *Harris v. Bell,* 562 F.2d 772 (1977). According to defendants, these cases preclude this Court from reviewing the Attorney General's exercise of discretion under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and thus deprive this Court of subject-matter jurisdiction over plaintiffs' Count V claims.

The Court has carefully examined the cases cited by defendants and concludes that these recent decisions do indeed compel the conclusion that this Court is without jurisdiction over plaintiffs' challenge to the procedures used by the Attorney General in deciding to interpose an objection to the City of Rome's proposed electoral changes. Admittedly, all three of the above-cited cases arose in a different posture than the instant case: *Morris* involved a challenge to the Attorney General's failure to interpose a timely objection to certain proposed electoral changes; *Briscoe* involved a state's challenge to its classification as a jurisdiction subject to the Act's preclearance requirements; and *Harris* involved a challenge to the Attorney General's withdrawal

of a previously-interposed objection. In contrast, this case involves a challenge to the Attorney General's interposal of an objection to certain proposed electoral changes.[2] The distinction between the instant case and the cases relied upon by defendants does not, however, vitiate the precedential force of the jurisdictional principle established in *Morris,* and followed in *Briscoe* and *Harris.*

In *Morris,* the Supreme Court held that even though no provision of the Voting Rights Act expressly precludes judicial review of the Attorney General's decision to preclear electoral changes under section 5, the legislative scheme of the Act as a whole compels the conclusion that "Congress intended to preclude all judicial review of the Attorney General's exercise of discretion or failure to act." 432 U.S. at 507 n.24. In support of this reasoning, the Court emphasized the fact that the Attorney General's decision not to interpose an objection to proposed electoral changes is not conclusive of the constitutionality of such changes. Rather, such electoral changes can at any time be challenged in "traditional constitutional litigation." 432 U.S. at 507.

The legislative scheme of the Act as a whole similarly compels the conclusion that a decision by the Attorney General to interpose an objection to proposed electoral changes, as in the instant case, was also not intended to be subject to judicial review. The administrative preclearance procedure is but one of two preclearance avenues that a state or local jurisdiction can pursue under section 5. It is an entirely optional procedure, and a jurisdiction subject to section 5's preclearance requirement need not apply to the Attorney General for administrative preclearance. It is sufficient if an applicant-jurisdiction seeks and obtains a declaratory judgment from a three-judge court

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[2] It is of no consequence in assessing this Court's jurisdiction over the instant challenge whether the challenge is couched in terms of improper procedures or in terms of improper result.

of the United States District Court for the District of Columbia that the proposed electoral change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the [rights of language minority groups]." Moreover, even if, as here, the Attorney General objects to certain proposed electoral changes, the applicant-jurisdiction can *always* seek such a declaratory judgment from a three-judge court in this District, which is precisely what plaintiffs have done in Count VI of the amended complaint herein. The existence of this "co-equal" judicial preclearance procedure persuades this Court that Congress intended there to "be no review of the Attorney General's application of the section 5 standards in deciding whether to interpose an objection within the sixty-day period." *Harris v. Bell*, 562 F.2d at 774.[3] Accordingly, the Court

[3] Plaintiffs have argued that *Morris*, *Briscoe*, and *Harris* must be distinguished from the instant case because here plaintiffs challenge the Attorney General's actions as violative of the Constitution rather than as violative of some statute, such as the Administrative Procedure Act. It is plaintiffs' contention that even if Congress can preclude judicial review of allegedly illegal actions of an officer of the Executive Branch, it cannot, consistent with the doctrine of judicial supremacy established by Marbury v. Madison, 1 Cranch 137 (1803), preclude review of those executive actions which are alleged to be unconstitutional.

Plaintiffs' argument is wholly untenable. Congress has neither totally insulated the Attorney General's actions from judicial scrutiny nor totally deprived plaintiffs of judicial redress. Congress merely has established *an exclusive means* of obtaining "review" of the Attorney General's determination—a *de novo* proceeding in the District Court for the District of Columbia. There can be no doubt plaintiffs can obtain full and adequate redress by means of such a *de novo* proceeding and there can be no doubt that Congress has the power, "pursuant to its constitutional power under Art. III, § 1, to "ordain and establish" inferior federal tribunals," to so limit the forums in which constitutional challenges may be brought. South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966). *See* Bowles v. Willingham, 321 U.S. 503, 510-12 (1944); Yakus v. United States, 321 U.S. 414, 427-33 (1944). As Justice Marshall wrote for the Court in a related context in *Briscoe:*

> [The limitations on review] . . . may well be an "uncommon exercise of congressional power," *South Carolina v. Katzenbach*, 383 U.S. at 334; see also *Morris v. Gressette*, [432 U.S.] at 501. But there can be no doubt that in attacking the pervasive evils and tenacious defenders of voting discrimination, Congress acted within its "power to enforce" the Fourteenth and Fifteenth amendments by appropriate legislation. *South Carolina v. Katzenbach, supra.*

432 U.S. at 414-15.

will, pursuant to Fed. R. Civ. P. 12(b)(1), dismiss Count V of the amended complaint for lack of subject-matter jurisdiction.

B. The Court will grant defendants' motion for a protective order and deny plaintiffs' motion to compel, both without prejudice, and will order the parties to confer in person and submit a joint memorandum to the Court with respect to any remaining contested discovery requests.

The dismissal of Count V would appear to resolve most of the discovery disputes identified by the parties in plaintiffs' motion to compel, defendants' motion for a protective order, and the respective oppositions thereto. Almost all of defendants' objections to plaintiffs' discovery requests were couched in terms of "relevancy" on the ground that (1) this Court had no subject-matter jurisdiction over Count V, and (2) the discovery requests were not relevant to any other Counts of the amended complaint. Plaintiffs have not indicated with specificity which, if any, of the disputed discovery requests they deem to be relevant to the *other* pending Counts. Under these circumstances, and in view of the Court's dismissal of Count V pursuant to Fed. R. Civ. P. 12(b)(1), the Court concludes that it is appropriate (1) to deny plaintiffs' motion to compel, and (2) to grant defendants' motion for a protective order.

Both of these rulings shall be without prejudice to plaintiffs' renewal of appropriate discovery requests that are relevant to the remaining counts in the amended complaint.[4]

In order to expedite the discovery process herein, the Court will order the parties to confer in person within five (5) days of the date of this Memorandum and accompanying Order so that they can identify any remaining areas of dispute with respect to the discovery requests that were the subject of the instant motions to compel and for a protective order. The Court will further order the parties to submit within five (5) days after their conference a joint memorandum that shall set forth any such remaining disputed discovery matters and the parties' respective positions, along with relevant points and authorities, on such disputed matters. This procedure seems particularly appropriate in light of defendants' representation that they are "willing to provide to plaintiffs . . . any material or information that it possesses and is relevant to, or is likely to lead to information which is relevant to, the issue of whether the voting changes for which plaintiffs seek preclearance are nondiscriminatory in purpose and effect." Defendants' Response of February 10, 1977, at 1.

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[4] Plaintiffs have suggested that defendants should be deemed to have waived their right to object to the discovery sought by plaintiffs because of certain representations made by the Government in a related case in the Northern District of Georgia. The Court finds that the particular representations relied upon by plaintiffs were quite limited in scope and were in any case made prior to the Supreme Court's decisions in *Morris* and *Briscoe*. Accordingly, the Court concludes that defendants have *not* waived any right to assert appropriate objections to any of plaintiffs' discovery requests.

II. Plaintiffs' Motion For An Order That Certain Facts Be Taken As Established.

During the discovery period herein, plaintiffs served upon defendants a number of requests for admission pursuant to Fed. R. Civ. P. 36. As to seven of these requests, defendants respond that they "are without knowledge or information sufficient" to determine the truth of the requested admissions. According to plaintiffs, such responses failed to comply with Rule 36(a), and plaintiffs therefore ask the Court to deem these matters admitted for the purposes of this litigation.

The Court agrees with plaintiffs that defendants' responses do not comply fully with Rule 36(a). To the extent that defendants, in formulating their responses to the seven requests in issue, have relied upon the fact that these requests concern "ultimate facts" for which plaintiffs bear the burden of proof, they have misinterpreted the effect of Fed. R. Civ. P. 36. Rule 36(a) expressly permits requests to encompass "*any* matters within the scope of Rule 26 (b)," and Rule 26(b) in turn permits discovery of "*any* matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." (Emphasis added.) These two rules, when read together, expressly permit requests for admissions to address claims of the party seeking discovery; and, as a general rule, the party asserting a claim bears the burden of proof thereon. *See* S. Gard, *Jones on Evidence*, § 5:5 (1972). Thus, it matters not that plaintiffs herein bear the burden of proof on the issues that they request defendants to admit. *See* C. Wright & A. Miller, *Federal Practice and Procedure*, § 2254, at 709 (1970). *See also Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F. 809 (7th Cir. 1942). It is also irrelevant that plaintiffs' requests sought admissions on so-called "ultimate facts." Rule 36(a) neither expressly

nor implicitly excepts such facts from its requirements. Indeed, the rule expressly states that a party may not refuse to respond to a request merely on the ground that the "matter for which an admission has been requested presents a genuine issue for trial."

To the extent that defendants now rely on the adequacy of their response that they "are without knowledge or information sufficient" to determine the truth of the requested admissions, defendants ignore the express language of Rule 36(a). In pertinent part, the rule states:

> An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or reasonably obtainable by him is insufficient to enable him to admit or deny.

Since defendants failed to state in their responses that they had made the reasonable inquiry required by Rule 36(a), defendants failed to comply literally with the rule. Nevertheless, defendants, in their memorandum in response to plaintiffs' motion for an order that certain facts be taken as established, have asserted that they have made the requisite "reasonable inquiry" and have expressed their willingness to amend their responses to the contested requests in order to comply literally with Rule 36(a). Under these circumstances, the order sought by plaintiffs is unwarranted, and the Court will therefore deny plaintiffs' motion to take certain facts as established. The Court will, however, order defendants to serve an amended answer upon plaintiffs within five (5) days of the date of this Memorandum and accompanying Order.

III. The Motions For Extensions.

The Court has before it two separate motions for extensions of time beyond the closing dates established by this

Court's Order of October 31, 1977, as amended by this Court's Order of December 12, 1977.

The first of these two motions for extension is defendants' motion to extend the discovery period herein an additional 45 days. Defendants assert such additional time is necessary to permit them time to take depositions of additional persons who have knowledge of facts related to the issues in this case. Plaintiffs strenuously oppose this motion for extension: They assert that they are ready to proceed with this case as soon as the discovery disputes before the Court have been resolved. The Court concludes that granting defendants a brief extension will aid in the full development of the facts of this case. The Court will not, however, permit discovery to continue for the full 45 days suggested by defendants. Accordingly, the Court will grant the parties an additional 20 days from the date of this Memorandum and accompanying Order within which to complete all further discovery in this case.

The second of the pending motions is a joint motion to extend the time for the filing of summary judgment motions until the pending discovery disputes are resolved and until all discovery herein is completed. The Court agrees with the parties that summary judgment motions would be premature until all discovery has been completed. Accordingly, the Court will grant the parties' joint motion for an extension of time. However, because the Court cannot be sure at this time when all discovery disputes will be resolved, the Court will not now establish a firm date when such summary judgment motions will be due. Upon the completion of all discovery and the resolution of any and all remaining discovery disputes, the Court will give the parties ten (10) days in which to file their summary judgment motions.

An Order in accordance with the foregoing will be issued of even date herewith.

/s/ CARL MCGOWAN
Carl McGowan
United States Circuit Judge

/s/ OLIVER GASCH
Oliver Gasch
United States District Judge

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C. A. No. 77-0797

CITY OF ROME, BRUCE HAMLER, and H. F. HUNTER,
Plaintiffs,

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL, Attorney General of the United States, and DREW S. DAYS, Assistant Attorney General of the United States,
Defendants.

ORDER

Filed February 22, 1978

Upon consideration of the pending motions, the oppositions thereto, the respective points and authorities in support thereof and in opposition thereto, the arguments of counsel in open Court on October 28, 1977, and the entire record herein, and for the reasons set forth in this Court's Memorandum of even date herewith, it is, by the Court, this 21st day of February, 1978,

ORDERED, that defendants' motion to dismiss Count V of the amended complaint be, and the same hereby is, granted, and Count V of the amended complaint is therefore dismissed; and it is

FURTHER ORDERED, that defendants' motion for a protective order be, and the same hereby is, granted, without prejudice to plaintiffs' renewal of an appropriate discovery request limited to the counts remaining in the amended complaint; and it is

FURTHER ORDERED, that plaintiffs' motion to compel be, and the same hereby is, denied, without prejudice to plain-

tiffs' renewal of appropriate discovery requests limited to the counts remaining in the amended complaint; and it is

FURTHER ORDERED, that the parties shall confer in person within five (5) days of the date of this Order to identify any remaining areas of dispute with respect to the discovery requests that were the subject of the instant motions to compel and for a protective order; and it is

FURTHER ORDERED, that the parties shall file with the Court, within five (5) days after their conference, a joint memorandum that shall set forth any remaining disputed discovery matters and the parties' respective positions, along with relevant points and authorities, on such disputed matters; and it is

FURTHER ORDERED, that plaintiffs' motion for an order that certain facts be taken as established be, and the same hereby is, denied; and it is

FURTHER ORDERED, that defendants shall file amended answers to the seven disputed requests for admissions within five (5) days of the date of this Order; and it is

FURTHER ORDERED, that defendants' motion for an extension of time within which to complete discovery be, and the same hereby is, granted in part; and it is

FURTHER ORDERED, that the parties shall have 20 days from the date of this Order within which to complete all discovery in this case, and no further extensions will be granted, save for exceptional cause shown; and it is

FURTHER ORDERED, that the patries' joint motion for an extension of time within which to file summary judgment

motions be, and the same hereby is, granted, with the Court to establish a precise date for the filing of such motions after all discovery disputes herein have been resolved.

/s/ CARL MCGOWAN
Carl McGowan
United States Circuit Judge

/s/ OLIVER GASCH
Oliver Gasch
United States District Judge

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 77-0797

CITY OF ROME, GEORGIA, et al., *Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*.

ORDER

Filed April 4, 1979

In accordance with the opinion which will follow, and upon consideration of the entire record herein, the arguments of opposing counsel, and in the interests of justice, it is, by the Court, this 3rd day of April, 1979,

ORDERED, that plaintiff City of Rome's unopposed request for summary judgment on the transfer of voter registration to Floyd County be, and the same hereby is granted; and it is

FURTHER ORDERED, that the defendant's motion for summary judgment on Counts I, II, III & IV of plaintiffs' amended complaint be, and the same hereby is, granted; and it is

FURTHER ORDERED, that defendants' motion for summary judgment on Count VI of plaintiffs' amended complaint be, and the same hereby is, granted, without prejudice to renewal by the plaintiff City of Rome upon the completion of actions consistent with the views expressed in the accompanying opinion, namely, the elimination of the city commission residency requirement in order to obtain preclearance of the annexations; and it is

FURTHER ORDERED, that the case be dismissed without prejudice to renewal in a manner consistent with the opinion and order in this case.

/s/ CARL MCGOWAN
Carl McGowan
United States Circuit Judge

/s/ OLIVER GASCH
Oliver Gasch
United States District Judge

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 77-0797

CITY OF ROME, GEORGIA, et al., *Plaintiffs*,

v.

UNITED STATES OF AMERICA, et al., *Defendants*.

OPINION

Filed April 9, 1979

Robert M. Brinson, City Attorney, City of Rome, Georgia, and William E. Sumner, Atlanta, Georgia, for Plaintiffs, with whom was Joseph W. Dorn, Washington, D.C.

Paul F. Hancock, Attorney, Department of Justice, for Defendants, with whom were Drew S. Days III, Assistant Attorney General, Gerald W. Jones, Frederick J. McGrath, and Carmen L. Jones, Attorneys, Department of Justice.

Before MCGOWAN, *Circuit Judge*, and GASCH and RICHEY, *District Judges*.

MCGOWAN, *Circuit Judge*: This is a declaratory judgment action brought under the Voting Rights Act of 1965, 42 U.S.C. § 1971 *et seq.* It is before the Court on pleadings styled cross-motions for summary judgment, based on evidence developed in a stipulated record. Although the parties recognize that the record presents genuine issues of material fact, they are willing for us to resolve these issues and reach final judgment. This we have done in the following opinion, which shall constitute the Court's Findings of Fact and Conclusions of Law as required by the Federal Rules.

I.

A.

Plaintiff City of Rome (Rome or the City) is a municipality situated in Floyd County, northwestern Georgia. Its 1970 population was 30,759, of whom 23,543, or 76.6%, were white and 7,216, or 23.4%, black. Of its total 1970 voting age population, 79.4% were white and 20.6% black; as of 1975, its 13,097 registered voters were 83.9% white and 15.5% black. The City is administered by a council-manager form of government. Plaintiff Bruce Hamler is the Rome City Manager and plaintiff H. F. Hunter, Jr. is Chairman of the Rome City Commission.[1]

The basic structure of the City's government was established by a Charter enacted in 1918 by the Georgia General Assembly. The charter provided for a Commission of seven members, one from each of seven wards, elected concurrently, at large, and by plurality vote. The same Charter established a Board of Education, consisting of five members elected concurrently, at large, and by plurality vote; unlike the City Commission, however, there was no residency requirement for the Board of Education. In 1929 two additional wards were annexed to the City, making a total of nine, and seats for these wards were provided in the City Commission. Election rules, however, remained substantially unchanged.[2]

Beginning in 1966, and after the November 1, 1964 coverage date of the Voting Rights Act, the Georgia General Assembly through Charter amendment made a number of changes in Rome's election procedures. It enacted a majority vote requirement for Commission and Board of Education general and primary elections and provided for

[1] Parties' First Stipulation of Facts 1-2.

[2] *Id.* at 3-4.

the conduct and timing of runoff elections;[3] reduced the number of wards from nine to three;[4] provided that the Commission was to consist of one Commissioner from one of three numbered posts in each of three wards;[5] increased the size of the Board of Education from five to six;[6] provided that the Board of Education was to consist of one member from one of two numbered posts in each of three wards and that each candidate had to be a resident of the ward in which he ran;[7] instituted staggered terms in the Commission and Board of Education;[8] eased restrictions on voter qualifications;[9] and transferred voter registration responsibility to the County.[10] In addition to these changes in voting procedures, some sixty annexations were effected after November 1, 1964 either by state law or by local ordinance.[11]

B.

The parties have developed voluminous evidence bearing on the history and present condition of black political affairs in the City of Rome. On the City's side of the balance sheet, we find that no literacy test or other device has been employed in Rome as a prerequisite to voter registration during the past seventeen years. While registrants were technically required to pass the state literacy or char-

[3] 1966 Ga. Laws 2376; *id.* 2383; *id.* 2816-17; *id.* 3084; 1970 Ga. Laws 2563-64; *id.* 3664-65.

[4] 1966 Ga. Laws 2379-80.

[5] 1966 Ga. Laws 2375-76; *id.* 2383-84.

[6] 1966 Ga. Laws 2816.

[7] 1966 Ga. Laws 2816.

[8] 1966 Ga. Laws 2375-76; *id.* 2816-17; 1967 Ga. Laws 3296-97.

[9] 1966 Ga. Laws 3069-70.

[10] Parties' First Stipulation of Facts Ex. 24-25.

[11] *Id.* at pp. 5-6.

acter tests, the affidavits of the City officials responsible for voter registration, supported by the unanimous testimony of black deponents, are to the effect that such tests have never been applied discriminatorily and have not been administered at all in recent years.[12] Similarly, the City has not employed other barriers to registration with respect to time and place, registration personnel, purging, or reregistration.[13] Also probative of the lack of discrimination in registration is the fact that black registration remained at a relatively high level throughout the period 1963-74.[14]

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[12] Affidavits in Support of Plaintiffs' Motion for Summary Judgment of Mrs. Ray Beard and Mrs. Helen Dowdy; Charmichael Deposition 21; Jackson Deposition 10; Aycock Deposition 7, 45; James Wright Deposition 22; Houser Deposition 8; Thomas Deposition 16-17; Moreland Deposition 48-49, 54; Joe Wright Deposition 42-43, 48; Fielder Deposition 69-71.

[13] Joe Wright Deposition 42-43, 48; James Wright Deposition 22-23; Aycock Deposition 44-45; Fielder Deposition 70; Moreland Deposition 49.

[14] Plaintiffs' Answers to Defendants' Interrogatories, Ex. 1. Plaintiffs supplied the following breakdown of total registered voters in Rome during this period:

YEAR	TOTALS BY RACE WHITE	BLACK	TOTAL REGISTERED VOTERS
1963	8097	1832	9929
1964	8313	1864	10177
1965	11241	2637	13878
1966	9182	2154	11336
1967	9532	2236	11768
1968	10585	2483	13068
1969	9906	2324	12230
1970	11081	2599	13680
1971	9969	2338	12307
1972	10481	2458	12939
1973	10080	2365	12445
1974	10610	2489	13099

Further, at least in recent years there have been no other direct barriers to black voting in Rome. Blacks have not been denied access to the ballot through the location of polling places, the actions of election officials, the treatment of illiterate voters or similar means. Nor is there any evidence of obstacles to black candidacy with respect to slating of candidates, filing fees, obstacles to qualifying, access to voters at polling places, or the like.[15] Indeed, whites, including City officials, have encouraged blacks to run for elective posts in Rome.[16] A black, Elgin Carmichael, was appointed to the Board of Education when a vacancy occurred in that body.[17]

The white elected officials of Rome, together with the white appointed City Manager, are responsive to the needs and interests of the black community.[18] The City has not discriminated against blacks in the provision of services and has made an effort to upgrade some black neighborhoods.[19] The City transit department, with a predominantly black ridership is operated through a continuing City subsidy.[20] And the racial composition of the City workforce

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[15] Defendants' Responses to Plaintiffs' Second Request for Admission of Facts and Genuineness of Documents, Nos. 4(a), 4(b), 31.

[16] Carmichael Deposition 31; Moreland Deposition 31; Hamler Deposition 48-50; Harvey Deposition 26.

[17] Carmichael Deposition 7.

[18] *Id.* at 23-24, 30, 39-40; Fielder Deposition 56; Houser Deposition 11-14; Jackson Deposition 42-45 (noting, however, that responsiveness of City Manager was greater than that of Commissioners); Moreland Deposition 18, 40.

[19] Hamler Deposition 57-66, 76-85, 142-145; Hunter Deposition 41-44, 65, 79-81.

[20] Hamler Deposition 91-98; Wade Deposition 22-26.

approximates that of the population, with a number of blacks employed in skilled or supervisory positions.[21]

In Rome politics, the black community, if it chooses to vote as a group, can probably determine the outcome of many if not most contests.[22] Thus, many white candidates vigorously pursue the support of black voters.[23] Several present Commissioners testified that they spent proportionally more time campaigning in the black community[24] because they "needed that vote to win."[25]

On the other hand, most black voters would prefer to have a black official representing their interests.[26] Yet there has never been a black elected to political office in the City of Rome. Indeed, only four blacks have ever sought such office. Two of them, M. D. Whatley and Dr. John W. Houser, Jr., ran for the Board of Education in the 1950's and early 1960's, respectively; neither did well.[27] Another black, Samuel Stubbs, ran in the 1972 Republican primary elec-

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[21] Hamler Deposition 98-115; Wade Deposition 32-33; Hunter Deposition 28-29; Clary Deposition 65-66.

[22] Although voters in Rome are predominantly Democrats, elections in the City are by no means a foregone conclusion; indeed, 6 of the 9 City Commissioners are Republicans, as is 1 of the 6 members of the Board of Education. Hunter Deposition 9.

[23] Clary Deposition 58-61; Hamler Deposition 44-47; Aycock Deposition 39-41; Carmichael Deposition 40; Moreland Deposition 38-39.

[24] Harvey Deposition 18-24; Hunter Deposition 14-17, 27; Wade Deposition 17-18.

[25] Wade Deposition 18; *see* Harvey Deposition 20.

[26] Carmichael Deposition 12; Aycock Deposition 53, 75-76; Jackson Deposition 11; James Wright Deposition 51-53; Joe Wright Deposition 20-21; Fielder Deposition 50.

[27] Aycock Deposition 9-10; Carmichael Deposition 13; Fielder Deposition 17; Houser Deposition 4-6, 10-11, 21; James Wright Deposition 36, 54-55.

tion for City Commission, and received only 79 votes out of the 276 cast.[28]

By far the strongest black candidate in Rome's history was Rev. Clyde Hill, who ran for the Board of Education in 1970 under the numbered-post, residency ward, majority-win system instituted in 1966.[29] Rev. Hill ran a vigorous campaign against three white opponents, and, with the strong support of the black community, received a plurality of the votes cast in the general election.[30] Because he did not receive a majority, however, he was forced into a run-off election with the runner-up and was defeated.[31]

In the years since the failure of Rev. Hill's candidacy, the black community in Rome has been politically apathetic.[32] It is widely believed among blacks that a black will never be elected to public office in Rome as long as the present majority-win system remains in effect.[33] A number

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[28] Stubbs Deposition 4; Parties' First Stipulation of Facts, Ex. 32.

[29] Hill Deposition 12-13.

[30] *Id.* at 17-18; Joe Wright Deposition 9-13; Aycock Deposition 16; James Wright Deposition 12; Moreland Deposition 10-12. Hill received 921 votes, as against 909 for Dr. Sara L. Hoyt, 407 for Jean V. Anderson, and 143 for Rev. Warren L. Jones. Parties' First Stipulation of Facts, Ex. 28.

[31] Dr. Hoyt received 1409 votes in the runoff election as compared with 1142 for Rev. Hill. Parties' First Stipulation of Facts, Ex. 29.

[32] Hill Deposition 31; Jackson Deposition 11. Rev. Hill's defeat in the runoff, after his seeming victory in the general election, came as a bitter disappointment to many in the black community. In the words of one deponent, it "killed a political dream of the people," so that young blacks particularly "have no faith in the political process here in the City of Rome." Moreland Deposition 12, 6.

[33] Hill Deposition 23, 30; Joe Wright Deposition 15-16; Aycock Deposition 24; James Wright Deposition 13; Thomas Deposition

of qualified blacks will not run for office because in their judgment they could not get a majority of the votes.[34]

Underlying this perception in the black community is a belief that bloc voting by race exists in the City of Rome. Racial bloc voting is a situation where, when candidates of different races are running for the same office, the voters will by and large vote for the candidate of their own race.[35] Unfortunately, a statistical demonstration of the existence *vel non* of racial bloc voting is impossible in the present case.[36] There is, however, other evidence of record proba-

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11-12; Moreland Deposition 14-15; Jackson Deposition 25. This conclusion was disputed by white City officials. Hunter Deposition 71, 78; Hamler Deposition 138-139; Wade Deposition 19.

[34] James Wright Deposition 14; Fielder Deposition 26; Joe Wright Deposition 14; Carmichael Deposition 14; Hill Deposition 31.

[35] The Supreme Court has recognized the existence of racial bloc voting and its effect on the minority race within the district:

> Where it occurs, voting for or against a candidate because of his race is an unfortunate practice. But it is not rare; and in any district where it regularly happens, it is unlikely that any candidate will be elected who is a member of the race that is in the minority in that district.

United Jewish Organizations v. Carey, 430 U.S. 144, 166-67 (1977) (plurality opinion).

[36] The surest method of demonstrating racial bloc voting is to analyze the results, broken down into a number of districts of differing racial makeup, of an election in which a white candidate is pitted against a black one. If there is a positive correlation in a sufficient number of districts between voters of one race and the percentage of votes received by the candidate of that race, then it can be inferred that racial bloc voting has occurred. Stated more impressionistically, if District A is 80% white, and the white candidate receives 80% of the vote, and District B is 80% black, and the black candidate receives 80% of the vote, it is a ready inference that white voters voted for the white candidate and blacks for the black. For a clear example of this type of statistical

tive of the existence of racial bloc voting.

First, the virtually unanimous testimony of black deponents was that, given a choice, voters in Rome will tend to vote for the candidate of their own race.[37] However, some deponents also opined that a given black candidate could pick up significant white support, although not enough to win.[38] White officials, on the other hand, unanimously testified that racial bloc voting does not exist in Rome.[39] Much of this opinion testimony, of course, is based on inferences drawn from the results in previous elections, particularly that involving Rev. Hill—facts which more effectively speak for themselves. However, the testimony would also appear to reflect inferences drawn from these long-time residents' knowledge of the racial atmosphere in

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demonstration, *see* City of Petersburg v. United States, 354 F. Supp. 1021, 1026 n.10 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973).

This type of analysis is impossible in Rome's case because, of the four races in which blacks ran against whites, two—those of M.D. Whatley and Dr. John W. Houser—occurred many years ago and apparently no records have survived, one—that of Samuel Stubbs—did not involve a sufficient number of votes, and one—that of Rev. Hill—could not be broken down by district. *See* Loewen Deposition 61-62.

[37] Aycock Deposition 20; James Wright Deposition 8; Moreland Deposition 10; Carmichael Deposition 11; *but see* Houser Deposition 17. Of course, the existence of bloc voting is the obvious, if sometimes unstated, premise upon which numerous deponents based their conclusion that no black could win an election in Rome. *See* note 34 *supra*.

[38] Carmichael Deposition 15; Jackson Deposition 55. Rev. Hill testified that he received considerable white support during his campaign, including financial contributions and printing services donated by a white-owned business. Hill Deposition 28, 36.

[39] Harvey Deposition 65; Hunter Deposition 17-18, 75; Wade Deposition 12-13, 39-49, 53; Clary Deposition 59-60, 81-85; Hamler Deposition 120-121, 159-161; Harry Johnson Affidavit.

Rome.[40] *See* Fed. R. Evid. 701. To this extent, the inference that bloc voting does exist is the more credible and rational one, because the white officials testifying to the contrary are "interested witness[es]," *see City of Richmond v. United States*, 422 U.S. 358, 377 (1975), because a belief in racial bloc voting was the predicate for decisions by a number of black deponents not to run for elective office, and because other relevant evidence interacts with and supports the conclusion that a substantial degree of racial bloc voting exists.

Rev. Hill's campaign is perhaps the clearest indication of the extent of racial bloc voting in Rome. With the solid support of the black community, Rev. Hill, as we have noted, achieved a plurality of the votes cast in the general election. In his losing runoff campaign, however, he picked up only 221 additional votes while his opponent gained 500. Moreover, although a lower turnout might have been expected for a runoff election involving a single Board of Education seat, 171 more votes were cast in the runoff than in the general election.[41] The most reasonable explanation for these results is that the white community, confronted with the imminent prospect of a black being elected, coalesced to defeat Rev. Hill. At the same time, it is probable that Rev. Hill did receive a sizable number of white votes. Even assuming that Rev. Hill's vigorous campaign impelled an unprecedented number of blacks to the polls, this factor alone probably cannot account for his 45% runoff tally in a town of roughly 15% black registration.

Finally, Dr. James W. Loewen, a political sociologist, testified as an expert witness that racial bloc voting existed in Floyd County during the 1968 Democratic United States Senate primary between Herman Talmadge and Maynard Jackson. Dr. Loewen concluded that at a mini-

[40] *E.g.*, Carmichael Deposition 14.

[41] *See* notes 30-31 *supra*.

mum 88.9% of the whites in Floyd County voted white and approximately 76.2% of the blacks voted black.[42] The value of this testimony, of course, must be discounted by the fact that the Jackson-Talmadge race involved state and national rather than local issues, occurred more than a decade ago, and was analyzed on a county-wide rather than city-wide basis. Nevertheless, despite these cautionary factors, Dr. Loewen's testimony is probative of the existence of racial bloc voting in Rome. Taking these three strands of evidence together—the testimony of black deponents, the results of Rev. Hill's campaign and the conclusions of the expert witness—we find that a substantial measure of racial bloc voting does exist in the City of Rome.

C.

The present litigation was seeded on June 15, 1974, when the City submitted an annexation to the Attorney General for approval pursuant to section 5 of the Voting Rights Act.[43]

[42] Loewen Deposition 15.

[43] Section 5 of the Act, 42 U.S.C. § 1973c, provides that:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence

(Footnote 43 Continued)

of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

The State of Georgia has been designated a covered subdivision pursuant to § 4 of the Act, 30 Fed. Reg. 9897 (1965), and its municipalities are required to comply with § 5, United States v. Board of Commissioners (Sheffield), 435 U.S. 110 (1978).

As a result of his investigation,[44] the Attorney General discovered that the other annexations and voting changes described above, *see* text accompanying notes 3-11 *supra,* had not been submitted for preclearance either to him or to this Court as required by section 5.[45] Eventually, Rome submitted all but one of these changes to the Attorney General for preclearance.[46] During the course of the administrative proceedings the Attorney General failed to object or withdrew his objections to, and thereby precleared, the following: (1) 47 of the 60 annexations; (2) the reduction in wards from 9 to 3; (3) the increase in size

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[44] On July 24, 1974, the Attorney General requested additional information regarding the submitted annexation, as well as disclosure regarding any other City annexations occurring since the effective date of § 5. Rome responded on Feb. 10, 1975, by submitting 59 additional annexations for preclearance. On March 6, 1975, the Attorney General requested further information regarding the annexations and asked the City whether there had been any changes in its electoral system since the effective date of § 5. Rome responded on June 2, 1975, supplying further information as to the annexations and confirming for the first time the existence of numerous changes in its voting rules. As a result of this disclosure, the Attorney General on August 1, 1975 interposed a technical objection to the annexations. On August 21, 1975, the City finally submitted its electoral changes for preclearance. *See* Second Supplement to Parties' Stipulation of Facts, Ex. 45.

[45] The voting changes at issue in this case are no doubt within the purview of § 5, Georgia v. United States, 411 U.S. 526 (1973); Allen v. State Bd. of Elections, 393 U.S. 544 (1969), as are the annexations insofar as they affect voting, City of Richmond v. United States, 422 U.S. 358 (1975); Perkins v. Matthews, 400 U.S. 379 (1971); City of Petersburg v. United States, 354 F.Supp. 1021 (D.D.C. 1972), *aff'd,* 410 U.S. 962 (1973). *See also* Dougherty County Bd. of Educ. v. White, 99 S.Ct. 368 (1978).

[46] The sole change not submitted to the Attorney General was the transfer of voter registration responsibility to Floyd County, which Rome has submitted directly to this Court pursuant to § 5. Because the Attorney General has not apposed preclearance, we grant the City's request for summary judgment as to this change.

of the Board of Education from 5 to 6; and (4) the easing of restrictions on voter qualifications. The Attorney General did object, however, to (1) 12 annexations, insofar as they relate to City Commission elections; (2) (a) majority vote, (b) runoff,[47] (c) numbered post, and (d) staggered term provisions for City Commission and Board of Education elections; and (3) the residency requirement for Board of Education elections.[48]

After the Attorney General refused to reconsider his decision, plaintiffs filed the present lawsuit. During the course of the litigation, two of plaintiffs' claims (Counts I and V of their amended complaint) were eliminated,[49] and the remaining issues are essentially four in number. Plaintiffs contend that Rome is entitled to "bailout" from coverage pursuant to section 4 of the Act (Count II); that some or all of the objected-to changes have already been administratively precleared (Count III); that section 5 is unconstitutional (Count IV); and that the disputed changes have neither the purpose nor the effect of denying or abridging the right to vote on the basis of race or color (Count IV). The first three of these are either pure questions of law or issues as to which the facts are undisputed,

[47] The Attorney General did not explicitly object to the runoff provisions. However, his objection to the majority vote requirements implicitly included the runoff provisions because the latter would be surplusage in a plurality-win system.

[48] Parties' First Stiplation of Facts 8-11.

[49] Count V of plaintiffs' amended complaint charged that the Attorney General had acted unconstitutionally in applying § 5 to the City of Rome. Relying on Morris v. Gresette, 432 U.S. 491 (1977) and Briscoe v. Bell, 432 U.S. 404 (1977), the Court dismissed this count on Feb. 22, 1978. City of Rome v. United States, 450 F.Supp. 378 (D.D.C. 1978).

Count I of the amended complaint charged that Rome was not a jurisdiction subject to § 5. Plaintiffs concede that this issue was decided adversely to them in the *Sheffield* case, United States v. Board of Commissioners, 435 U.S. 110 (1978).

and are therefore appropriately disposed of on summary judgment. The fourth question does involve genuine issues of material fact, but because, as we have noted, the parties are willing for us to reach a judgment based on the stipulated record, we make Findings of Fact and Conclusions of Law on this count also.

As an initial matter, the City seeks to "bail-out" from section 5's coverage by invoking the declaratory judgment procedure of section 4(a). Under the structure of the Act, the jurisdictions subject to section 5's preclearance procedures are those "with respect to which the prohibitions set forth in [section 4(a)] are in effect."[50] Section 4(a),[51] in turn, prohibits the use of tests or devices[52] as prerequi-

[50] *See* note 43 *supra*.

[51] The relevant portion of § 4(a), 42 U.S.C. § 1973b(a), provides that

> To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section.

[52] Section 4(c), 42 U.S.C. § 1973b(c), defines "test or device" to mean

> any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrates the ability to read,

sites to voting (1) "in any State" which the Attorney General has determined to fall within the coverage formulae of section 4(b) [53] or (2) in "any political subdivision with respect to which such determinations have been made as a separate unit." However, section 4(a) further provides that "such State or subdivision may exempt itself—or, as it is sometimes called, "bail-out"—from these prohibitions by bringing a declaratory judgment action before this Court and establishing that "no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color." The statutory circle is completed with reference back to section 5: if a jurisdiction succeeds in its bail-out action, the prohibitions of section 4(a) are no longer effective and therefore the jurisdiction is not subject to section 5 preclearance.

The issue of whether municipalities in covered states may independently seek to bail-out is apparently one of first

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write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

[53] Section 4(b), 42 U.S.C. § 1973b(b), provides in pertinent part

"The provisions of [§ 4(a)] shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964."

As we have noted, the Attorney General has determined Georgia to be a covered jurisdiction. *See* note 43 *supra*.

impression.[54] In arguing its entitlement to such a remedy, the City lays great stress on the recent *Sheffield* decision, *United States v. Board of Commissioners*, 435 U.S. 110 (1978), in which the Supreme Court held that when an entire state is subject to the Act, its political subunits must comply with section 5 even though they may not be "political subdivision[s]" as that term is defined in section 14(c)(2) of the Act.[55] The Supreme Court reaffirmed the *Sheffield* holding, after argument in the present case, in *Dougherty County Board of Education v. White*, 99 S.Ct. 368, 375-77 (1978). Rome argues that if municipalities are now to be subject to section 5, it would be anomalous and unfair if they are not permitted to bail-out from the Act's coverage under section 4(a).

In statutory terms, the issue is whether Rome is a "State" or "[political] subdivision" within the meaning of section 4(a). Rome argues that in light of *Sheffield*, it must be considered a "political subdivision" for purposes of section 5 and, by implication, section 4. We see little merit to this position. *Sheffield* did *not* hold that municipalities within covered states are "political subdivision[s]"; quite to the contrary, the Court concluded that

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[54] Judge Gasch addressed this quetsion in his concurring opinion in Gaston County v. United States, 288 F.Supp. 678, 691 (D.D.C. 1968), *aff'd*, 395 U.S. 285 (1969). His conclusion comports with that we reach herein: "No subdivision or part of an area that has been certified can come out alone; each certified unit must petition this Court for relief as a whole." The issue was not squarely presented in *Gaston County*, however, because that case involved a bail-out action brought by a county in a state which, unlike Georgia, had not been certified as subject to § 5.

[55] Section 14(c)(2), 42 U.S.C. § 1973*l*(c)(2), provides that

"Political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

"where . . . a State has been designated for coverage, the meaning of the term 'political subdivision' has no operative significance in determining the reach of § 5: the only question is the meaning of '[designated] State' ". 435 U.S. at 126. Moreover, even if Rome were considered a "political subdivision" its cause would not be furthered. The section 4(a) bail-out remedy applies, not to all subdivisions, but only to those the Attorney General has determined to be covered *"as a separate unit"*—an event which has not occurred in Rome's case.

Although Rome is clearly not a "political subdivision" for purposes of section 4(a), a stronger argument can be made that, under *Sheffield,* it is a "State" within the meaning of that section. The Court in *Sheffield* interpreted section 4(a)'s prohibition of tests or devices "in any State" to import a geographical reach. It then inferred that in light of the close connection between sections 4 and 5, the "State[s]" required to seek judicial or administrative preclearance for voting changes under section 5 included not only covered States themselves but also all subsidiary political units within their borders. By like reasoning, it would seem that the "State[s]" entitled to bring section 4(a) bail-out actions should also include political subunits within covered states. Hence, it could be argued, Rome, considered as a "state," should be entitled to its bail-out action here.

Despite the abstract force of this approach, we are unwilling to use logic as a means of subverting congressional intent. *See Philbrook v. Glodgett,* 421 U.S. 707, 713 (1975); *United States v. American Trucking Associations,* 310 U.S. 534, 542-44 (1940). And the intent of Congress in the present case is crystal clear. The House Report on the bill that became the Voting Rights Act explicitly rejected Rome's theory: "[The] opportunity to obtain exemption is afforded only to those States or to those subdivisions as to which the formula has been determined to apply as a

separate unit; *subdivisions within a State which is covered by the formula are not afforded the opportunity for separate exemption."* H.R. REP. No. 439, 89th Cong., 1st Sess. 14 (1965) (emphasis added) [hereinafter cited as H.R. REP.]. The same point was made by 12 members of the Senate Committee expressing their joint individual views: "We are also of the view that an entire State covered by the test and device prohibition of section 4 must be able to lift the prohibition if any part of it is to be relieved from the requirements of section 4." S.REP. No. 162, Pt. 3, 89th Cong., 1st Sess. 16 (1965) [hereinafter cited as S.REP.]; *see also id.* at 21.

Moreover, the construction urged upon us by the City could well lead to many of the same evils whose existence in 1965 prompted passage of the Voting Rights Act. Congress was aware that existing legislation had not succeeded in implementing the Fifteenth Amendment and eliminating the blight of racial discrimination in voting. Efforts to accomplish these goals through case-by-case adjudication had proved ineffective because they were "onerous to prepare" and "exceedingly slow" to produce results. *South Carolina v. Katzenbach,* 383 U.S. 301, 314 (1966). And even when litigation was successful, some of the affected jurisdictions "merely switched to discriminatory devices not covered by federal decrees." *Id.* To combat these twin evils of burdensome case-by-case litigation and persistent "obstructionist tactics" by the affected jurisdictions, Congress enacted a series of stern measures, including section 5, to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.* at 328.

Permitting political subunits of covered states to bail-out alone would, we believe, subvert the purposes of section 5 by opening the door to a resurgence of these same evils. It would impose a potentially severe administrative burden on the Attorney General by forcing him to defend numerous bail-out suits brought by political subunits. As noted

in the House Report, "to permit each such subdivision to litigate the [bail-out] issue . . . would impose a continuation of the burdensome county-by-county litigation approach which has been shown to be inadequate." H.R.REP., *supra*, at 14.

Even more troublesome is the possibility that covered States could circumvent the purposes of the Act simply by causing their sub-jurisdictions that have successfully pursued a bail-out remedy to engage in discriminatory practices.[56] In the words of the Senate Committee members, "in most of the States affected by section 4 local boards of registration are so closely and directly controlled by and subject to the direction of State boards of education—and, indeed, the State legislature—that they would be required to misapply tests and devices, irrespective of their own inclinations, if this suited the general policy of the State government." S.REP., *supra*, at 16. Similar considerations were a motivating factor in the *Sheffield* and *Dougherty County* cases. The Court observed that exempting municipalities from section 5 "would invite States to circumvent the Act . . . by allowing local entities that do not conduct voter registration to control critical aspects of the electoral process." *Sheffield, supra*, 435 U.S. at 125; *accord, Dougherty County, supra*, 99 S.Ct. at 375.

[56] Although a covered state would have to submit for § 5 preclearance any legislation transferring voting authority to local jurisdictions, we do not believe that this requirement is sufficient to prevent circumvention of the Act. For one thing, to the extent that a political subunit possesses authority under existing state law to implement potentially discriminatory voting changes, no § 5 preclearance would be required of the state. *Beer v. United States*, 425 U.S. 130 (1976). Secondly, even when a § 5 submission is required, it is likely that the Attorney General or this Court would grant preclearance because a transfer of voting authority is nondiscriminatory on its face.

In sum, then, we conclude that despite any logical inference that might be drawn from *Sheffield*, the reasoning of that case coupled with the legislative history and overarching purposes of the Voting Rights Act compel the conclusion that political subunits of a covered state cannot independently bring a section 4(a) bail-out action.

III.

A.

The City next argues that certain of its election rules, namely the majority vote, runoff election, and numbered post provisions, have in fact already been precleared by the Attorney General. As we have noted, *see* text accompanying notes 3-11 *supra*, these provisions were adopted as part of Rome's Charter in 1966. In 1968, the State of Georgia enacted a comprehensive Municipal Election Code (1968 Code), submitted it to the Attorney General, and obtained preclearance thereof. Rome argues that the Attorney General, in preclearing the 1968 Code, thereby approved by reference the City's 1966 Charter amendments.

The 1968 Code provided that if a municipality's charter or ordinance, "as now existing or as amended subsequent to the effective date of this subsection," called for plurality voting, that provision would be effective. If the local legislation did not call for plurality voting, the 1968 Code required majority voting and runoff elections.[57] Rome argues

[57] With respect to majority voting, the 1968 Code provided in pertinent part:

> If the municipal charter or ordinance, as now existing or as amended subsequent to the effective date of this Subsection, provides that a candidate may be nominated or elected by a plurality of the votes cast . . ., such provision shall prevail. Otherwise, no candidate shall be nominated for public office

that its Charter, having been amended in 1966 to provide for majority voting, did not provide for plurality voting in 1968, and that therefore the 1968 Code mandated majority voting and runoff elections. Similarly, the 1968 Code provided that "charter or ordinance provisions now in effect or hereinafter enacted shall govern" whether numbered posts would be used.[58] Rome urges that because the Charter provision "in effect" in 1968 was the 1966 amendment creating numbered posts, the 1968 Code imposed or ratified a numbered post requirement. Therefore, in Rome's view, the granting of preclearance to the 1968 Code constituted preclearance to the majority vote, numbered post and runoff election provisions of the City Charter.

The Supreme Court has twice addressed the question of what constitutes a "submission" of a voting change

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in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast. . . .

Ga. Code § 34A-1407(a).

With respect to runoff elections, the 1968 Code provided, in pertinent part

In instances where no candidate receives a majority of the votes cast and the municipal charter or ordinance does not provide for nomination or election by plurality vote, a runoff primary or election shall be held, between the two candidates receiving the highest number of votes.

Id. § 34A-1407(b).

[58] The 1968 Code provided, in pertinent part:

In the case of a candidate seeking one of two or more public offices each having the same title and to be filled at the same election by the vote of the same electors, charter or ordinance provisions now in effect or hereinafter enacted shall govern whether such candidate shall designate the specific office he is seeking.

Ga. Code § 34A-902.

for purposes of section 5. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), it rejected the argument that a submission occurred whenever the Attorney General became aware of a particular state enactment. In the Court's view, it was necessary that the submitting jurisdiction "in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act." 393 U.S. at 571. In *Sheffield, supra*, the Attorney General precleared a city's proposal to hold a referendum on the question of whether to switch from a commission to a mayor-council form of government. He objected, however, to the result of the referendum, in which the voters approved the proposed change. The Court rejected the argument that in approving the referendum the Attorney General also approved the change in form of government, stating that "the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." 435 U.S. at 136.

We think *Allen* and *Sheffield* compel rejection of the City's theory. Georgia, in our view, submitted to the Attorney General only its decision to defer to local charters and ordinances regarding majority voting, runoff elections, and numbered posts, and, possibly, its expression of a general policy in favor of majority voting. It did not, however, submit in an "unambiguous and recordable manner" all municipal charter provisions, as written in 1968 or as amended thereafter, regarding these issues. To be sure, the Attorney General could have inferred from the submission that some municipalities had recently adopted or planned to adopt such rules. But the Court in *Sheffield* rejected the theory that voting changes are to be deemed submitted merely because an earlier submission renders the occurrence of these changes very likly. Just as in *Sheffield* the submission of a decision to hold a refer-

endum did not incorporate by reference the results of that referendum, so, here, submission of state laws authorizing municipalities to adopt certain provisions in their charters does not constitute submission of the actual exercise of this authority by local governments. We might add, finally, that Rome has even less claim to have submitted its voting changes than did the litigants in *Allen* and *Sheffield,* since in the earlier cases the Attorney General was at least made aware of the changes at issue, whereas here, due to Rome's delay in submitting its 1966 Charter amendments, the Attorney General had never been given notice, as of 1968, that these changes had even taken place.[59]

B.

The City raises a second argument that its voting changes have been administratively precleared, this time focusing on the Attorney General's actions in 1976. Rome sought reconsideration of the Attorney General's objection to its electoral changes and annexations on May 24, 1976. On July 14, 1976, before the Attorney General had responded, the City supplemented its request with two additional affidavits. On August 12, 1976, the Attorney General declined to withdraw his objection.[60]

The Attorney General has by regulation provided that requests for reconsideration shall be acted upon within

[59] Because we hold that Rome's election changes were never "submitted" to the Attorney General in 1968, we find it unnecessary to reach the Government's argument that the changes were not precleared because, not having been submitted for preclearance immediately after their adoption in 1966 as required by the Act, they were unenforceable and, in effect, void as of the date the Georgia Municipal Election Code was submitted.

[60] Second Supplement to Parties' Stipulation of Facts, Ex. 45.

60 days of their receipt. 28 C.F.R. § 51.3(d) (1978).[61] *See generally Georgia v. United States,* 411 U.S. 526, 536-41 (1973). Rome computes the 60 days as running continuously from May 24, the date of the initial request for reconsideration, in which case the period would have expired prior to the Attorney General's response on August 12. The Government, on the other hand, computes the period as running from July 14, the date Rome supplemented its request, in which case the response was timely.[62]

We agree with the Government that the time period commenced anew when Rome supplemented its request on July 14. In the analogous situation of an original submission, the Government has the power to request additional information and, in its unreviewable discretion, *Morris v. Gresette,* 432 U.S. 491 (1977), to delay commencement of the 60-day period until the information is received if it believes the initial submission is unsatisfactory. 28 C.F.R. § 51.18(a).[63] When additional information is supplied at

[61] This section provides:

> When the Attorney General objects to a submitted change affecting voting, and the submitting authority seeking reconsideration of the objection brings additional information to the attention of the Attorney General, the Attorney General shall decide within 60 days of receipt of a request for reconsideration (provided that he shall have at least 15 days following a conference held at the submitting authority's request) whether to withdraw or to continue his objection.

[62] The Government also contends that the 60-day period of § 51.3 (d) is merely a goal rather than a binding commitment. While we need not decide this issue here, we do note that the language of § 51.3(d) is mandatory rather than permissive and that it tracks the time requirement for responses to initial submissions, which is statutorily binding on the Attorney General. *See also* note 63 *infra.*

[63] The City stresses the proviso in § 51.13(d), *see* note 61 *supra,* tolling the period for at least 15 days following a conference held at the submitting authority's request. We agree that this proviso supports the argument that the 60-day period is binding on the

the initiation of the submitting jurisdiction rather than the Government, there is even more reason to view the period as commencing anew from the time of receipt.[64] We conclude, therefore, that the Attorney General has not precleared the voting changes at issue in this case.[65]

IV.

The plaintiffs next raise a congeries of arguments challenging the constitutionality of section 5 of the Voting Rights Act. They attack that section as being (1) beyond

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Government, *see* note 62 *supra*, because if the period were merely advisory, the Government would not have felt the need explicitly to exempt itself in one special situation. We do not find, however, that this proviso is the *exclusive* means of tolling the period. Because the regulations are silent on the effect of supplements to requests for reconsideration, we are free to treat this situation in the way that most comports with the purposes of the Act and its implementing regulations.

Further, we do not find that the City's submission of additional affidavits constituted a "conference" within the meaning of the proviso.

[64] If we were empowered to review the merits of the Attorney General's decisions under § 5, we might be inclined to find that he had ample opportunity to respond within 60 days of the initial submission. The City's brief supplemental affidavits were hardly of a nature to impose a significant additional burden on the Attorney General. However, under the teachings of *Briscoe v. Bell*, 432 U.S. 404 (1977) and *Morris v. Gresette*, 432 U.S. 491 (1977), we are unwilling to second-guess the Attorney General on an issue implicating his unreviewable judgment of the merits of a § 5 application.

[65] We cannot help observing, too, that the City's hands are not scrupulously clean when it comes to timeliness. Rome took nearly a decade to submit any of its voting changes to the Attorney General. When asked for further information, it waited nearly seven months to respond. And it took more than a year to complete its submission after first setting the process in motion. *See* note 44 and accompanying text *supra*.

the power of Congress under the Fifteenth Amendment; (2) an infringement of the rights reserved to the states under the Tenth Amendment; (3) a violation of the Guarantee Clause; and (4) an infringement of the rights of the private plaintiffs under various constitutional provisions.

We are bound to note, at the outset, that in asking this Court to declare section 5 unconstitutional, the plaintiffs summon us to a life of high adventure. For we could not do as the plaintiffs ask without overruling or ignoring unequivocal and repeated holdings by the Supreme Court of the United States. In *South Carolina v. Katzenbach*, the Court held that section 5, together with certain other provisions of the Act, is "an appropriate means for carrying out Congress' constitutional responsibilities and [is] *consonant with all other provisions of the Constitution.*" 383 U.S. 301, 308 (1966) (emphasis supplied). Far from backing away from *Katzenbach*, the Court has in the ensuing years often cited that case with approval. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 157 (1977) (plurality opinion); *id.* at 180 n. * (Stewart, J., concurring in the judgment); *Beer v. United States*, 425 U.S. 130, 133 (1976); *Georgia v. United States*, 411 U.S. 526, 535 (1973); *Allen v. State Board of Elections*, 393 U.S. 544, 548 (1969). *Accord, Wilkes County v. United States*, 450 F. Supp. 1171, 1177 (D.D.C.), *aff'd*, 99 S.Ct. 606 (1978).

It is true, as plaintiffs point out, that this impressive line of cases has not been without an undercurrent of dissent or at least unrest. Justice Black, the only member of the Court not to join the opinion in *Katzenbach*, believed that section 5's preclearance procedure "so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless." *Katzenbach, supra*, 383 U.S. at 358 (Black, J., concurring and dissenting); *see also Allen, supra*, 393 U.S. at 595-97 (Black, J., dissenting); *Perkins v. Matthews*, 400 U.S. 379, 401-07 (Black,

J., dissenting). Other Justices have also expressed misgivings. *See Georgia v. United States, supra,* 411 U.S. at 545 (Powell, J., dissenting); *Holt v. City of Richmond,* 406 U.S. 903 (1972) (Burger, C.J., concurring); *Allen, supra,* 393 U.S. at 586 & n.4 (Harlan, J., concurring and dissenting).

Further, it is undeniably true, as plaintiffs urge, that the constitutional climate has changed considerably since the *Katzenbach* decision. Of particular relevance to the present case, the Supreme Court in *National League of Cities v. Usery,* 426 U.S. 833 (1976), revivified the principles of federalism embodied in the Tenth Amendment. Federalism concerns have also played a prominent role in other recent cases, *e.g., Francis v. Henderson,* 425 U.S. 536 (1976); *Rizzo v. Goode,* 423 U.S. 362 (1976). And in a separate line of cases, the Court has held that the equal protection components of the Fifth and Fourteenth Amendments condemn only purposeful discrimination, not actions discriminatory in effect but not in intent. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1976); *Washington v. Davis,* 426 U.S. 229 (1976). Plaintiffs argue that, were the Court to reconsider the constitutionality of section 5 in light of these other cases, it would strike that provision down.

As a federal District Court, however, we should be slow indeed to disobey an explicit command of the Supreme Court absent compelling indications that the Court has now changed its mind. And we do not find such indications in the present case. To the contrary, our best estimate is that, were the Court writing on a clean slate today, it would affirm the constitutionality of section 5 much as it did in *Katzenbach* 13 years ago.

Before reaching the merits, however, we must dispose of a question going to our jurisdiction which, although not raised by the parties, we are obligated to decide *sua sponte.* The jurisdiction of this 3-judge District Court is

established, for present purposes, in section 5 of the Act.[66] The cause of action over which jurisdiction is in terms conferred by section 5 is restricted to preclearance actions, and the only parties explicitly authorized to bring such actions are covered jurisdictions. The claims we consider in the present section are, however, constitutional challenges to the Act, some of them brought by private parties rather than the City. We are doubtful that this Court has statutory jurisdiction over such claims.[67]

Despite these doubts, we find we can take jurisdiction over the claims on a pendant jurisdiction theory. The constitutional and Voting Rights Act claims arise from a "common nucleus of operative fact," *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966), and the interests of judicial efficiency call for their resolution in a single proceeding. Moreover, we do not perceive in section 5 any congressional intent to preclude our taking jurisdiction either over the City's constitutional assertions or over the claims of the private plaintiffs as to whom Congress has not extended the section 5 cause of action.[68] *See Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365 (1978); *Adlinger v. Howard,* 427 U.S. 1 (1976). We therefore see

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[66] Section 4(a) also grants this Court jurisdiction to hear bail-out actions such as that brought by the City as part of this lawsuit. Section 4(a), however, obviously does not grant jurisdiction over challenges to the constitutionality of § 5.

[67] It may be, of course, that a single-judge federal District Court would have jurisdiction to consider these claims under some other provision, such as 28 U.S.C. § 1331.

[68] Although the City of Rome purports to bring suit as the *parens patriae* of its private citizens, it has been settled since *South Carolina v. Katzenbach, supra,* 383 U.S. at 324, that no state or municipal government can sue the federal government in a *parens patriae* capacity. The claims of the private parties must therefore be viewed as brought in their individual capacities only.

no reason not to take jurisdiction over all the constitutional claims.

A.

Plaintiffs first argue that Congress simply had no power to prevent a state or local jurisdiction from implementing voting changes which, although not motivated by racial animus, nevertheless have the effect of diluting black voting strength.[69] Section 5 of the Voting Rights Act in terms requires a covered jurisdiction to demonstrate the absence of discrimination both in purpose and in effect. *See* note 43 *supra*. However, the Fifteenth Amendment, which is the source of Congress' power to enact section 5,[70] in plaintiffs' view outlaws only *purposeful* discrimination. Therefore, they argue, Congress acted beyond its constitutional powers insofar as it purported to proscribe voting changes discriminatory in *effect* only.[71]

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[69] We would, of course, have no occasion to reach this issue were we to find that all the voting changes in question resulted from purposeful discrimination. As we discuss in Part V, however, we conclude that these changes are discriminatory in effect but not in purpose. Rome's argument is thus squarely presented for decision on the facts of this case.

[70] Congress undoubtedly intended to exercise its Fifteenth Amendment powers in enacting § 5. *E.g.*, South Carolina v. Katzenbach, *supra*, 383 U.S. at 308. It is not certain whether § 5 could be sustained under some other constitutional power. *Compare* Allen v. State Bd. of Educ., 393 U.S. at 588-89 (Harlan, J., concurring and dissenting) *with* Katzenbach v. Morgan, 384 U.S. 641, 646-47 n.5 (1966). In light of our holding herein, we do not address the latter question.

[71] Section 5 goes beyond the Fifteenth Amendment in another sense also. While in litigation brought directly under the Fifteenth Amendment the burden is on the party challenging a voting practice to show discrimination, under § 5 the burden shifts to the practice's proponent to show the absence of discrimination. South Carolina v. Katzenbach, *supra*, 383 U.S. at 335; cases cited at note 80 *infra*. Plaintiffs do not challenge this shifting of the burden of proof.

Whether the Fifteenth Amendment reaches only purposeful discrimination is an important and unsettled constitutional question. The Supreme Court, in *Arlington Heights* and *Washington v. Davis, supra,* may have intimated an answer when it held that the equal protection components of the Fifth and Fourteenth Amendments reach only purposeful discrimination.[72] A panel of the Fifth Circuit has recently held, largely on the basis of these cases, that the Fifteenth Amendment reaches only purposeful discrimination. *Nevett v. Sides,* 571 F.2d 209 (5th Cir. 1978). The Supreme Court, however, has never explicitly addressed the question.[73] And as Judge Wisdom pointed out, specially concurring in *Nevett, id.* at 231, despite their close historical connections there are important structural differences between the Amendments: the Fifteenth Amendment would not appear as firmly grounded on a core idea of intentional discrimination and, being far more restricted in scope, does not present as compelling a case for a limiting construction. Moreover, as Judge Wisdom noted, the special character of the franchise, which is "a fundamental political right, because preservative of all rights," *Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1886),

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[72] *See also* Duren v. Missouri, 99 S. Ct. 664, 670 n. 26 (1978) (dictum that *both* purpose *and* effect are necessary to an equal protection violation). *Cf.* Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (first amendment).

[73] Justice Marshall, dissenting in Beer v. United States, *supra,* 425 U.S. at 148-149 n.4, identified three possible approaches to the purpose/effect question, each one of which, as he read the cases, has been adopted by the Court at one time or another in recent years:

> The possible theoretical approaches are three: (1) purpose alone is the test of unconstitutionality, and effect is irrelevant, or relevant only insofar as it sheds light on purpose; (2) effect alone is the test, and purpose is irrelevant; and (3) purpose or effect, either alone or in combination, is sufficient to show unconstitutionality.

may serve to distinguish it from the panoply of other constitutional rights protected by the Fourteenth Amendment.

We need not decide this question here, however, because even assuming, *arguendo*, that the Fifteenth Amendment reaches only purposeful discrimination, we find that Congress was within its broad enforcement power under section 2 thereof when it outlawed voting changes discriminatory in effect only. Chief Justice Warren emphasized the sweeping nature of this power in *South Carolina v. Katzenbach, supra*, 383 U.S. at 327, when he quoted with approval the following broad statement in *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879):

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

As the Chief Justice noted, this language echoes the classic formulation of congressional power under the Necessary and Proper Clause:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

Under this standard, we have no doubt but that section 5's ban on "effect" discrimination is an appropriate means even if it is assumed that the desired end is solely the elimination of purposeful discrimination. For one thing, discriminatory effects raise a legitimate, and often com-

pelling, inference of purpose. The Court recognized this fact in *Washington, supra:*

> Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.

426 U.S. at 242. *Accord, Arlington Heights, supra*, 429 U.S. at 264-66.

While the inference of invidious purpose would be a legitimate one in any case, it is especially strong in the case of the Voting Rights Act. Congress, in its investigation preceding passage of the Act, found that pervasive purposeful voting discrimination existed in various parts of the country, particularly in the Southern states. The Act's coverage formula, *see* note 53 *supra*, was designed to identify those states or subjurisdictions that were most likely to have engaged in a pattern of invidious discrimination. *South Carolina v. Katzenbach, supra*, 383 U.S. at 329-30. Thus, congressional fact finding, to which we are inclined to pay great deference, *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966), strengthens the inference that, in those jurisdictions covered by the Act, state actions discriminatory in effect are discriminatory in purpose also.

The means of banning "effect" discrimination is well adapted to the end of eliminating purposeful discrimination in another sense also. Congress found as a fact that many of the jurisdictions subject to the Act had taken various actions designed to nullify the effect of adverse

federal court decrees. As explained in *South Carolina v. Katzenbach, supra:*

> Even when favorable decisions have finally been obtained, some of the states affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.

383 U.S. at 314 (footnotes omitted).

As jurisdictions became increasingly sophisticated at evading the strictures of federal decrees, they frequently adopted tactics characterized by superficial racial neutrality. *See* S.Rep. *supra,* at 5, H.R.Rep., *supra,* at 8. Given the frequent lack of state legislative histories and the unreliability of other means of ascertaining legislative intent, Congress could well have concluded that wholesale evasion of the Act was likely unless discriminatory effects could be taken as conclusive evidence of purpose. Such a conclusion would comport with Congress's broad tactic, in the Voting Rights Act, of "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach, supra,* 383 U.S. at 328.

Viewed most narrowly, then, section 5 of the Act simply represents an exercise by Congress, based on facts found during an exhaustive investigation, of its power to establish standards of proof for facts which are admittedly Fifteenth Amendment violations. In effect, Congress can be said to have instructed the courts that the existence of racially disproportionate impact raises an irrebuttable presumption of invidious purpose. We can see no constitutional

impediment to Congress' taking such an approach. *See South Carolina v. Katzenbach, supra,* 383 U.S. at 330.

This conclusion finds support in the Court's treatment of the Voting Rights Act's ban on literacy tests and other voter qualifications. In *Lassiter v. Northhampton County Board of Elections,* 360 U.S. 45 (1959), a case decided prior to enactment of the Voting Rights Act, the Court held that literacy tests and related devices were not *per se* violative of the Fifteenth Amendment, although "[o]f course a literacy test, fair on its face, may be employed to perpetuate that discrimination which the Fifteenth Amendment was designed to uproot." *Id.* at 53. Without disavowing *Lassiter,* the Court in *South Carolina v. Katzenbach, supra,* held that Congress had power to suspend the operation of such tests within jurisdictions subject to the Act. And in *Oregon v. Mitchell,* 400 U.S. 112 (1970), the Court unanimously upheld Congress' subsequent suspension of literacy tests on a nationwide basis. These cases, we think, present a substantial analogy to the present challenge. In *Lassiter,* the Court in effect held that although use of a literacy test does not *per se* contravene the Fifteenth Amendment, it at least raises a legitimate inference of such a violation. In the Voting Rights Act, Congress could be said to have created an irrebuttable presumption, based on extensive legislative fact finding, that use of a literacy test established the existence of a constitutional violation. The Court's upholding of this presumption in *South Carolina v. Katzenbach* and *Oregon v. Mitchell* is strong evidence that the presumption established by section 5 of the Act—that invidious purpose is to be presumed given the existence of disproportionate impact—would also be upheld.[74]

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[74] In light of this disposition, we need not inquire whether, still assuming that the Fifteenth Amendment of its own force reaches purpose only, Congress has the power under Katzenbach v. Morgan, 384 U.S. 641 (1966), to extend the substantive content of

B.

Plaintiffs' second constitutional argument is that, even if Congress otherwise had the power to enact section 5, we must nevertheless strike that provision down, under the rule of the *National League of Cities* opinion, as invading the protected sphere of traditional state autonomy. Plaintiffs' argument, in our view, reads far too much into *National League of Cities*. The Court in that case held that Congress could not, consistently with principles of federalism embodied in the Tenth Amendment, exercise its power under the Commerce Clause to extend minimum wage and maximum hour regulations to employees of state and local governments. Despite the seeming breadth of the federalism principle articulated, the Court was at pains to limit its holding to Commerce Clause regulations and, significantly, expressed no view as to "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as . . . § 5 of the Fourteenth Amendment." 426 U.S. at 852 n.17. In reserving this question, the Court also implicitly left undecided the issue in the present case of whether, or to what extent, the *National League of Cities* principle places limits on congressional action pursuant to the enforcement power in section 2 of the Fifteenth Amendment.

Fifteenth Amendment protections so as to proscribe voting discrimination in effect as well as in purpose.

A similar issue arises in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, which forbids "effect" discrimination in employment matters, Griggs v. Duke Power Co., 401 U.S. 424 (1971), although the Fourteenth Amendment, which together with the Commerce Clause was the basis for congressional power to enact Title VII, reaches of its own force only purposeful discrimination. *See* Note, ***Title VII and Public Employers: Did Congress Exceed its Powers?*** 78 COLUM. L. REV. 372 (1978).

The Court gave very strong indications of how it would resolve the latter question in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), a case decided just four days after *National League of Cities* and also written by Justice Rehnquist. The question in *Fitzpatrick* was whether, against the shield of the Eleventh Amendment, Congress had power to authorize an award of retroactive monetary relief against the states as a means of enforcing the Fourteenth Amendment. The Court's answer was unequivocal:

> [W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Id. at 456.[75]

Although *Fitzpatrick* did not directly address the question presented here, we find that analytically it compels

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[75] This analysis was followed in Hutto v. Finney, 437 U.S. 678 (1978), upholding the Civil Rights Attorney's Fees Awards Act of 1976 against the claim that it infringed the states' Eleventh Amendment immunity.

a like result. To be sure, the case arose under the Fourteenth Amendment rather than the Fifteenth; but these Amendments share a common history and both have explicit enforcement provisions. The Court in *Fitzpatrick* strongly hinted that the analysis would be the same in both cases. Citing *Katzenbach*,[16] the Court observed that it has

> sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a "carving out". . . .

Id. at 455-56, *quoting Ex Parte Virginia*, 100 U.S. 339, 346 (1880). We are also aware that *Fitzpatrick* involved the Eleventh rather than the Tenth Amendment. Again, however, these amendments share a common grounding in "*principle*[*s*] *of state sovereignty*," 427 U.S. at 456 (emphasis supplied), and we see no reason to suppose that in this context the states' Tenth Amendment immunities should be significantly broader than those under the Eleventh Amendment. The short of it is, as the Court stated in *Katzenbach*,

> As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in

[16] This citation is of particular relevance because the primary constitutional challenge to the Voting Rights Act provisions in *Katzenbach* was based on the Tenth Amendment, *i.e.*, "that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution." 383 U.S. at 323.

> voting. . . . *The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.*

383 U.S. at 324, 325 (emphasis supplied).

The only remaining question, then, is whether section 5 of the Act is an "appropriate" means of enforcing the Fifteenth Amendment. As the Court has frequently noted, the section 5 requirement that state and local governments submit changes in their laws affecting voting to the Attorney General is an "unusual, . . . in some aspects a severe, procedure," *Allen, supra*, 393 U.S. at 556, and a "stern and powerful remedy," *Briscoe v. Bell, supra*, 432 U.S. at 410. The function of section 5 is in effect to freeze the electoral processes of a covered jurisdiction until the necessary preclearance is obtained. In so providing, "Congress was well aware of the extraordinary effect the Act might have on federal-state relationships and the orderly operation of state government." *Allen, supra*, 393 U.S. at 563. Nevertheless, Congress made a considered judgment that this extraordinary procedure was necessary to remedy the systematic evasion of the Fifteenth Amendment that had hitherto been occurring. The Court upheld the appropriateness of this congressional judgment in *Katzenbach*, and has never since questioned or otherwise undermined this holding.[17] We conclude, therefore, that section 5 of the

[17] Plaintiffs claim that, as a result of the operation of § 5, no elections have taken place in Rome since 1974. We have some doubt as to whether the sole responsibility for the freezing of elections in Rome rests with the operation of § 5, or whether, on the contrary, the present City officials do not bear a share of the blame. *See* text accompanying note 79 *infra*. In any event, a 5-year suspension of elections during § 5 litigation is by no means unusual. When the Supreme Court decided Beer v. United States, *supra*, elections had been frozen for six years, while in City of Richmond v. United States, *supra*, the Court remanded to the District Court for further factfinding a case in which elections had already been frozen for 5 years.

Act is entirely consistent with the principles of federalism as embodied in the Tenth Amendment and articulated in *National League of Cities.*

C.

We need not reach the merits of plaintiffs' contention that section 5 constitutes a violation of the Guarantee Clause,[78] since it has long been settled that such issues are generally not justiciable in federal court. *Baker v. Carr,* 369 U.S. 186 (1962); *Luther v. Borden,* 48 U.S. (7 How.) 1 (1849). We are bound to note, moreover, that section 5 would appear to be, if anything, an affirmative exercise of Congress' power under that provision rather than an abrogation of its duty. The purpose of section 5, simply speaking, is to guarantee to the covered jurisdiction one essential feature of a truly republican form of government—*i.e.,* the equal right of any citizen, irrespective of race or color, to exercise the franchise. *See* S. REP., *supra,* at 34.

D.

The private plaintiffs claim that, allegedly as a result of the operation of section 5, regularly scheduled elections have not been held in Rome since 1974 and cannot be held at least until the completion of this litigation. The private plaintiffs assert that as a result of their inability to vote in municipal elections, they have been deprived of certain rights guaranteed under various provisions of the Constitution.

We note, at the outset, that the damage complained of by the private plaintiffs is at least as much the result of the actions of Rome's elected officials as of the Voting Rights Act. It would appear that, because the Attorney General has precleared the reduction in wards from 9 to

[78] U.S. Const., Art. IV, § 4.

3 but has not precleared certain other voting changes, the City Charter as presently effective contains inconsistencies that would make an election technically infeasible. The Attorney General, however, has made known his willingness to permit elections on the pre-existing at-large and plurality-win system.[79] Doubtless, the Attorney General would readily preclear any technical amendments to the City Charter necessary to permit the holding of elections and effective operation of the City government. It would not appear that the City has even discussed this possibility with the Attorney General.

Even if we agreed that the injuries complained of result from operation of the Voting Rights Act, we would find little merit to the plaintiffs' arguments. We need not decide whether the right to vote in a municipal election when that election is regularly scheduled can ever be deemed a fundamental right protected by the Constitution. For even if fundamental interests were at stake, we believe section 5 of the Act is justifiable as advancing the compelling national interest of enforcing the Fifteenth Amendment by "eras[ing] the blight of racial discrimination in voting." *Sheffield, supra,* 435 U.S. at 118, *quoting South Carolina v. Katzenbach, supra,* 383 U.S. at 308. Moreover, the means chosen in section 5 were narrowly tailored to advancing this interest. To be sure, the preclearance procedure, as Congress recognized, is a stringent and even drastic measure. But Congress chose to adopt this procedure because in its considered judgment nothing less would effectively combat the pervasive evil of discrimination in voting. In the words of Chief Justice Warren:

> Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil

[79] Defendants' Response to Plaintiffs' Motion for Interim Relief, at 5.

> which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

South Carolina v. Katzenbach, supra, 383 U.S. at 309.

We note, too, that Congress adopted a number of measures designed to mitigate what it recognized to be the potentially harsh operation of section 5. Thus, states or separately covered political subdivisions are permitted to bail-out from section 5's coverage under section 4(a) of the Act. *See* Part II *supra.* Moreover, Congress provided jurisdictions the alternative of submitting their voting changes for approval to the Attorney General rather than to this Court. The administrative preclearance mechanism was intended to be, and has in fact operated as, a non-burdensome procedure by which the vast proportion of voting changes are approved within a brief period. Further, Congress provided that, should litigation occur, it was to take place before a 3-judge District Court with direct appeal to the Supreme Court, thus giving the plaintiff jurisdiction the advantages of plenary consideration at the trial level together with quick access as of right to the Supreme Court without the burden of passing through an intermediate appellate stage.

In light of the foregoing considerations, we find that none of plaintiffs' constitutional challenges to section 5 of the Act has merit. We therefore decline the suggestion to depart from the Supreme Court's explicit statement that section 5 is constitutional "under all . . . provisions of the Constitution." *South Carolina v. Katzenbach, supra,* 383 U.S. at 308.

V.

Finally, we come to the basic issue for decision in any section 5 case, *i.e.*, whether the plaintiff jurisdiction has carried its burden of showing that the voting changes at issue had neither the purpose nor the effect of denying or abridging the right to vote on account of race or color.[80] This determination requires us to make findings, as requested by the parties, of disputed issues of material fact. Thus, our decision as to this question is more properly styled a final judgment on the basis of the stipulated record rather than a summary judgment.

A.

Although the issue is a close one, we conclude that the City has carried its burden of showing that its non-annexation voting changes were not enacted with a discriminatory purpose. It is, of course, grounds for suspicion that these provisions were adopted so soon after passage of the Voting Rights Act. The "specific sequence of events leading up to the challenged decision," *Arlington Heights, supra,* 429 U.S. at 267, is obviously important evidence from which an invidious purpose can be inferred. Moreover, as we discuss below, the provisions adopted are typical of those generally thought to be aimed at preventing the black community's maximizing its voting strength through "single-shot" voting. *See* note 95 and accompanying text *infra.* Finally, although the then-City Attorney, Mr. Clary, testified that he recommended the switch to

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[80] It is well established that the § 5 plaintiff has the burden of demonstrating both lack of invidious purpose *and* absence of discriminatory effect. Beer v. United States, 425 U.S. 130, 140-41 1976); Georgia v. United States, 411 U.S. 526, 538 (1973); South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966); Wilkes County v. United States, 450 F. Supp. 1168, 1177-78 (D.D.C.), *aff'd,* 99 S. Ct. 606 (1978); City of Petersburg v. United States, 354 F. Supp. 1021, 1027-28 (D.D.C. 1972), *aff'd,* 410 U.S. 962 (1973).

majority voting in order to comply with the Georgia Election Code of 1964,[81] the record demonstrates that the 1964 law did not in fact apply to municipal elections.[82]

The City, however, has adequately rebutted these inferences through the testimony and affidavits of many of those who played a part in the adoption of the 1966 City Charter amendments. These amendments were recommended to the Commission by Mr. Clary. The Commission, presumably after consultation with the City Manager, requested the local representatives to the State legislature to introduce the proposed amendments as local legislation. The representatives complied with the request, and the Georgia General Assembly proceeded to enact the Charter amendments as introduced. The City has obtained the sworn statements of participants at every stage in this process—the City Attorney,[83] five Commissioners,[84] the City Manager,[85] and the local representatives to the State legislature [86]—to the effect that their actions were not motivated by any consideration of race or color. Although these officials may be "interested witnesses," *City of Richmond v. United States*, 422 U.S. 358, 377 (1975), the unanimity of their sworn statements cannot be discounted. We are unwilling, particularly on the basis of a stipulated record, to question their credibility in this regard.

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[81] Clary Deposition 54-55 & Ex. 1.

[82] *See* Second Supplement to Parties' Stipulation of Facts, Ex. 44 ¶ IV at 2.

[83] Clary Deposition 56.

[84] Affidavits in Support of Plaintiffs' Motion for Summary Judgment of Grover C. Byars, S. L. Hancock, Lucian Oldham, R. L. Starnes and John E. Yarmough.

[85] Hamler Deposition 28, 116.

[86] Affidavits in Support of Plaintiffs' Motion for Summary Judgment of J. Rattle Hall and Terry J. Minge.

Thus, on the present record we accept the argument that the majority vote and associated runoff election and numbered posts [87] provisions were enacted primarily because of the City Attorney's mistaken belief that such a system was required under state law. Staggered terms were most likely adopted because City officials felt they would contribute to continuity in the City Government.[88] And the Board of Education residency requirement, we find, was enacted to ensure responsiveness by Board members to the particular concerns of their wards.[89]

We reach a different result, however, on the question of whether the City has met its burden of showing the absence of discriminatory *effects* from its non-annexation voting changes. With respect to the majority vote and runoff election provisions, the discriminatory effect is clear beyond peradventure. Under the plurality-win system, a black candidate in Rome would stand a good chance of election if the white citizens split their votes among numerous candidates and the black voters engaged in "single-shot" voting, *i.e.*, voted only for the candidate or candidates of their choice.[90] Under the majority vote/runoff

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[87] The City Attorney testified that numbered posts were needed to facilitate the division of the Commission into committees. Clary Deposition 51-53. This objective could easily have been accomplished without numbered posts, however. A more likely explanation is that numbered posts were intended to make majority voting possible by conveniently dividing Commission and Board of Education elections into separate races.

[88] Clary Deposition 45-47; Hunter Deposition 11-13; Harvey Deposition 11-12.

[89] See Clary Deposition 27-30, 36-39; Hamler Deposition 22-24; Harvey Deposition 10-11.

[90] The United States Commission on Civil Rights has described single-shot voting as follows:

> Consider . . . the town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candi-

election scheme, however, the black candidate, even if he gained a plurality of votes in the general election, would still have to face the runner-up white candidates in a head-to-head runoff election in which, given bloc voting by race [91] and a white majority,[92] the black candidate would be at a severe disadvantage. Rev. Hill's Board of Education campaign exemplifies the dilutive effect on black voting strength of these rules: he would have been elected under the pre-1966 plurality-win system, but was defeated by the white candidate in the runoff election under the majority vote regime.[93]

The effects of the numbered posts, staggered terms, and Board of Education residency provisions are somewhat less clear. The Government has argued, in conclusory terms, that these rules have a discriminatory impact on black voting strength because such provisions "promote head-to-head contests between white and black condidates and deprive the black community of the opportunity to elect a candidate of their choice through single-shot voting." [94]

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dates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.

U.S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After 206-07 (1975).

[91] *See* text accompanying notes 37-42 *supra*.

[92] *See* text accompanying note 1 *supra*.

[93] *See* text accompanying note 41 *supra*.

[94] Defendants' Proposed Findings of Fact and Conclusions of Law §§ 29, 30.

Although the Government's conclusions are not inherently unreasonable and, at least with respect to single-shot voting, are supported by expert authority,[95] we could have benefitted from citation of supporting studies from the statistical or political sciences. Nevertheless, the City has shown us nothing at all that might refute the Government's argument. In this situation we are bound to find that it has failed to satisfy its burden of demonstrating that numbered posts, staggered terms and the residency provision do not have the effect of discriminating on the basis of race or color.

B.

The defendants concede that the thirteen contested annexations were not effected out of discriminatory purpose.[96] The only question, therefore, is whether the annexa-

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[95] In the words of the U.S. Commission on Civil Rights,

> There are a number of voting rules which have the effect of frustrating single-shot voting . . . . [I]nstead of having one race for four positions, there could be four races, each for only one position. Thus for post no. 1 there might be one black candidate and one white, with the white winning. The situation would be the same for each post, or seat—a black candidate would always face a white in a head-to-head contest and would not be able to win. There would be no opportunity for single-shot voting. A black still might win if there were more than one white candidate for a post, but this possibility would be eliminated if there were also a majority requirement.
>
> [Second,] each council member might be required to live in a separate district but with voting still at large. This—just like numbered posts—separates one contest into a number of individual contests.
>
> [Third,] the terms of council members might be staggered. If each member has a 4-year term and one member is elected each year, then the opportunity for single-shot voting will never arise.

U.S. Comm'n on Civil Rights, *supra* note 90, at 207-08.

[96] Defendant's Proposed Findings of Fact and Conclusions of Law ¶ 19.

tions had a discriminatory effect within the meaning of section 5.

Although annexations have long been held subject to the Voting Rights Act, *Perkins v. Matthews,* 400 U.S. 379 (1971), they do present unusual considerations and require special judicial treatment. The problem, broadly stated, is that virtually any annexation will change the racial balance in the jurisdiction and thereby, in a sense, dilute the voting power of a particular racial group. Application of a mechanistic test for voting dilution would require this Court to deny preclearance to practically all annexations, even those accomplished for compelling and non-discriminatory reasons of municipal finance, orderly growth, or provision of services. Such a result, as we recognized in *City of Petersburg v. United States,* 354 F.Supp. 1021, 1030 (D.D.C. 1972), *aff'd,* 410 U.S. 962 (1973), could not be consonant with the intent of Congress when it enacted the Voting Rights Act. To the contrary, it is probable that Congress would have condoned even annexations that dramatically altered racial balance so long as those annexations were not discriminatory in purpose and did not have the effect of perpetuating or reinforcing discriminatory effects stemming from the operation of other discriminatory voting rules.

The solution adopted in *City of Petersburg,* and subsequently endorsed by the Supreme Court, was to treat the voting practices under review in annexation cases as being, not the geographic extension of boundary lines, but rather the expansion of the particular voting system existing in the community at the time of the annexation.[97] It is not sufficient, under this doctrine, that an annexation significantly reduces the proportion of voters of a particular

[97] "The Court concludes then, that this annexation, insofar as it is a mere boundary change and not an expansion of an at-large system, is not the kind of discriminatory change which Congress sought to prevent. . . ." 354 F.Supp. at 1031.

race; it is necessary also that the minority race must be denied the opportunity to obtain "representation reasonably equivalent to [its] political strength in the enlarged community." *United Jewish Organizations v. Carey,* 430 U.S. 144, 160 (1977), *quoting City of Richmond, supra,* 422 U.S. at 370-71; *accord, City of Petersburg, supra,* 354 F. Supp. at 1030.

Additionally, this Court in *City of Petersburg* fashioned a remedial device, also subsequently endorsed by the Supreme Court, *City of Richmond, supra,* 422 U.S. at 369-370, designed to ensure that annexations in violation of the above standard could nevertheless be accomplished as simply and rapidly as possible upon elimination of the offending features of a city's voting rules.[98] Although the Court denied preclearance to the contested annexation, it retained jurisdiction over the case and directed the plaintiff to "prepare a plan for conducting its city council elections in accordance with the requirements of the Voting Rights Act as interpreted by this Court. . . . Judgment in *City of Petersburg, supra, quoted in City of Richmond, supra,* 422 U.S. at 370. In effect, the Court conditioned approval of the annexation upon the City's amending its voting rules to comport with the legal standard articulated in that case.

Application of *City of Petersburg* and later cases requires us to determine (1) whether the annexations significantly altered the racial balance in Rome; and (2) if so, whether the post-annexation political system ensures the black community representation reasonably commensurate with its voting strength in the expanded City.

In addressing the first question, we will look at the annexations as of the date of the most recent information—

[98] The Court in *City of Petersburg* had no power to mandate reform in the rules themselves, apart from the annexations, because these rules had not been changed. *Cf.* Beer v. United States, 425 U.S. 130 (1976).

information which reflects an effect on black voting strength considerably more pronounced than was the case when the annexations were initially implemented.[99] This approach comports with the terms of section 5, *quoted* in note 43 *supra*, which requires, in the future tense, that the plaintiff jurisdiction demonstrate that its voting changes "*will not*" have a discriminatory effect; it comports also with the fact that cities frequently annex relatively unpopulated areas for purposes of future growth and development. Prior judicial opinions further teach that a court in Voting Rights Act cases should respond to the

[99] The following table indicates the racial composition, in the annexed areas, of the gross, voting age, and registered voter populations:

	Population by Race				Voting Age Population				No. Registered Voters			
	At Annexation		February 1978		At Annexation		February 1978		At Annexation		February 1978	
Annexed Area	White	Black	White	Black	White	Black	White	Black	White	Black	White	Black
Saddle Mountain	0	0	78	0	0	0	141	0	0	0	134	0
Holmes Acres (E. 11th Ext.)	144	0	263	0	95	0	174	0	31	0	98	0
Lyons Drive West Rome	78	3	315	28	51	1	208	16	8	0	35	6
Georgian—Old Salem Apts.	0	0	295	6	0	0	195	3	0	0	42	1
Battey Hospital	35	0	32	0	21	0	21	0	8	0	11	0
Maplewood Square	0	0	84	0	0	0	55	0	0	0	42	0
Garden Lakes Rollingwood	0	0	172	0	0	0	114	0	0	0	38	0
Berkshire Estates	0	0	112	0	0	0	74	0	0	0	61	0
W.A. DuPre—Rockmart Rd.	0	0	321	8	0	0	222	2	0	0	49	1
Westminster Apts. Harry Butler	0	0	220	10	0	0	138	3	0	0	49	1
Castle Cove Subdivision	0	0	95	0	0	0	63	0	0	0	14	0
Saddle Mt., Sec. 4 Bill DuPre	0	0	84	0	0	0	55	0	0	0	47	0
Old Airport Community	781	0	511	0	515	0	337	0	241	0	203	0
TOTALS	1,038	3	2,582	52	682	1	1,797	24	288	0	823	9

realities of a situation as they exist at the time of decision.[100]

Additionally, we will not treat these thirteen annexations as separate voting changes, in which case we would be compelled to sustain many of them as having *de minimis* effect only.[101] Instead, we view them as a single and unified whole. The reality is that these annexations, although effected separately, have an indivisible cumulative impact on black voting strength in Rome. We are also concerned lest the Act be frustrated through piecemeal changes which are insignificant when taken separately but of considerable moment when added together. Finally, viewing these annexations from the present perspective and as a unit is eminently fair in light of the fact that the reason for the delay and for our consideration of the annexations as a group was Rome's initial failure to comply with the Act by submitting them when they occurred.

Viewed in this manner, we find that the annexations in question significantly alter the racial balance in Rome. To be sure, the effect here is not as compelling as in *City of Petersburg* or *City of Richmond*, cases in which the annexations resulted in a shift from a black majority population to a white majority. But the effect in the present case is significant nonetheless. As of February, 1978, the annexed areas contained 2,582 whites, 823 of whom were registered to vote, and 52 blacks, only 9 of them registered. By comparison, in 1975 the registered voters in the City

[100] *See City of Richmond, supra*, 422 U.S. at 373-375 (even if annexations were originally undertaken with an impermissible purpose, they can be sustained under § 5 if at the time of decision there are sound non-discriminatory grounds to support them); Perkins v. Matthews, *supra*, 400 U.S. at 394-95 (even though voting change was officially made prior to effective date of the Act, change had to be submitted for preclearance because not implemented in fact until after effective date).

[101] *See* note 99 *supra*.

as a whole totalled 10,982 whites and 2,026 blacks.[102] Thus, it is fair to infer that presently close to 10% of the white voters, and virtually none of the black voters, reside in the annexed areas.

Because we find the impact on black voting strength to be significant, we must inquire further whether the black community after the annexations, has a fair opportunity to obtain representation reasonably commensurate with its post-annexation numerical strength. Our answer would be clear if it were based on Rome's political system as presently instituted. In light of our findings as to the effect of the Charter amendments also at issue in this case, we have no doubt that a significant increase in the proportion of white voters perpetuates and reinforces the discriminatory effect of these voting rules. However, because of our findings and conclusions in this regard, Rome's legally effective electoral system operates under pre-1966 rules, *i.e.*, with plurality voting and without numbered posts, staggered terms, runoff elections or the Board of Education residency requirement. Whether the annexations have a discriminatory effect when viewed against this context is a far more difficult question.

Even under the pre-1966 rules, Rome's elections would be conducted at-large and, we presume, would be characterized by a high degree of racial bloc voting. These two factors were also present in *City of Petersburg, supra,* in which the Court found the annexation to have discriminatory effect and conditioned approval thereof on the city's abandonment of at-large voting in favor of elections by ward. If *City of Petersburg* is controlling here, we would have to deny preclearance of these annexations and condition our approval upon Rome's adoption of some acceptable plan for elections by single-member districts.

[102] Parties' First Stipulation of Facts ¶3.

There are, however, substantial factual differences between the cases. Most significantly, perhaps, elections in Petersburg were by majority vote whereas those under Rome's pre-1966 rules are by plurality vote—the latter rule, as we have noted, *see* notes 90-93 and accompanying text *supra,* being much more conducive to the election of a black candidate. Further, the facts recited by the Court in *City of Petersburg* reveal a far greater degree of racial polarization than is present in Rome's relatively benign racial atmosphere. And while Rome's elected officials have been quite responsive to the interests of the black community, the City Council of Petersburg was generally unresponsive to black needs.

The evidence in the present case tends to show that blacks will have a fair opportunity to obtain representation reasonably commensurate with their post-annexation voting strength. Rev. Hill, as we have noted, would have been elected to the 6-member Board of Education under a plurality system; and there is no reason why a similarly strong black candidate could not garner sufficient votes to win 1 of the 9 City Commission seats. A number of black witnesses stated that a black could win under a plurality system;[103] and only one black witness testified that single-member districts were necessary if blacks were to elect the candidate of their choice.[104] Moreover, adequacy of representation is not measured solely by the black community's ability to elect its first-choice candidate. Because blacks often hold the balance of power in Rome elections, they are situated to exert considerable influence over many elected officials, not simply those representing an exclusively black constituency. On the other hand, while single-member districts might guarantee the election of one representative of the black community, such a scheme could ironically diminish the overall effectiveness of representa-

[103] Joe Wright Deposition 14; Charmichael Deposition 15.

[104] Moreland Deposition 45.

tion by eliminating the inducement for white officials to respond sympathetically to black needs.

There are other disadvantages to judically enforcing a switch to single-member districts that make us loath to do so absent a somewhat more compelling showing that existing voting rules and practices would operate discriminatorily. For one thing, as the Court noted in *City of Petersburg,* single-member districts can sometimes result in the hegemony of special interests over the needs of the whole community:

> We recognize that the election from single-member districts of a number of governmental representatives to a body composed of several members, rather than being elected at-large from the governmental unit, has the effect of making the representatives from the single districts more responsive to the special interests and characteristics of the individual district. Conversely, the election of all such representatives from the governmental unit at-large (as from an entire city) generally causes the representatives to be more responsive to, and characteristic of, the interests of the entire city. Representatives from single districts generally are more responsive to the special interests of their districts, and at-large representatives generally serve the entire community more effectively.

354 F.Supp. at 1027. We are also concerned at the intrusiveness of a federal court requiring the City, on pain of being frozen into outmoded boundaries, to abandon the at-large rule, which has been the fundamental premise of Rome's electoral system since 1918. Particularly because this Court has no authority, under section 5, to affect the at-large rule directly, *Beer v. United States,* 425 U.S. 130 (1976), our conditioning approval of the annexations upon adoption of single-member districts might be viewed as inappropriate.

These various considerations are reinforced by the position taken by the Department of Justice on this issue. Although the Attorney General has suggested that single-member districts would be an appropriate means of minimizing the impact of the annexations, he has nowhere stated that this is the only acceptable approach. To the contrary, during the administrative proceedings, the Justice Department indicated that it was willing to reconsider its objection to the annexation if the City agreed to revert to a simple plurality-win system. Indeed, the Attorney General *withdrew* his objection to the annexations insofar as they affected Board of Education elections because these elections reverted automatically to an acceptable plurality-win system when he interposed objections to the Board of Education's staggered term, majority voting, runoff election and residency provisions. The Attorney General did not withdraw his objection with respect to City Commission elections only because the residency requirement for these elections had been adopted prior to the date of the Act and therefore remained in effect. The implication was that the Attorney General would be willing to grant full preclearance to the annexations if the residency requirement were eliminated.[105]

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[105] The Justice Department's letter, in pertinent part, read as follows:

> With respect to the objection to the 13 annexations, we are mindful of the suggestion in my October 20, 1975, letter that the Attorney General would reconsider his determination should the city, *inter alia,* undertake again to elect its councilmen and Board of Education members by a simple plurality-win system which does not incorporate the limiting features objected to therein. Since the continued objection to those features renders the majority vote requirement, numbered posts and residency requirement for Board of Education elections legally unenforceable the necessary effect of that objection is a reversion to the previously existing simple plurality-win system. In view of that circumstance, therefore, the Attor-

While we in no way sit in judgment on the merits of the Attorney General's determinations made during administrative preclearance proceedings, *Morris v. Gresette,* 432 U.S. 491 (1977); *Briscoe v. Bell,* 432 U.S. 404 (1977), we do find this letter to be strong evidence of what the Attorney General would be willing to accept in the present proceeding. Further, because the residency requirement is a relatively minor and peripheral aspect of Rome's voting procedures, we do not perceive particular dangers of intrusiveness inherent in our conditioning approval of the annexations on its abandonment. We will therefore deny the City's motion as regards the annexations. However, this denial is without prejudice to renewal by the City, if it wishes to obtain preclearance, upon the undertaking of suitable action consistent with the views expressed herein.

VI.

For the reasons expressed in the preceding discussion, we grant the City's unopposed request for summary judgment on the transfer of voter registration duties to Floyd County. We deny the plaintiffs' motion for summary judgment, and grant that of the defendants, on Counts I, II, III and IV of plaintiffs' amended complaint. Count V,

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ney General withdraws his objection to the 13 annexations insofar as Board of Education elections are concerned.

We cannot, however, reach a similar conclusion relative to City Commission elections. The pre-existing residency requirement for commission elections (which the Attorney General's objection does not reach because it did not constitute a change) prevents that electoral system from being a simple plurality-win system. Consequently, in view of the limiting residency feature in the context of at-large voting and indications that racial bloc voting exists, the Attorney General is unable to withdraw his objection to the 13 annexations insofar as City Commission elections are concerned.

Second Supplement to Parties' Stipulation of Facts, Ex. 45.

as we have noted, has previously been disposed of.[108] Treating the papers as motions for final judgment on the basis of the stipulated record with respect to Count VI, we grant the defendants' motion and deny that of the plaintiffs. However, this decision is without prejudice to renewal regarding that portion of the decision which concerns the effect of the annexations.

/s/ CARL MCGOWAN
Circuit Judge

/s/ CHARLES R. RICHEY
District Judge

I concur in the result

/s/ OLIVER GASCH
District Judge

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[108] *See* note 49 *supra.*

APPENDIX C

Title 42 United States Code

§ 1973b. Suspension of the use of tests or devices in determining eligibility to vote—Action by state or political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court

(a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia is an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section. *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of seventeen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this subchapter, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section through the use of such tests or devices have

occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose of with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the seventeen years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section, he shall consent to the entry of such judgment.

Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register

(b) The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director

of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

Definition of test or device

(c) The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Required frequency, continuation and probable recurrence of incidents of denial or abridgement to constitute forbidden use of tests or devices

(d) For purposes of this section no State or political subdivision shall be determined to have engaged in the use of tests or devices for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title if (1) incidents of such use have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

Completion of requisite grade level of education in American-flag schools in which the predominant classroom language was other than English

(e)(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

(2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully com-

pleted an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures

(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c) of this section, the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or

voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b) of this section, the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided,* That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court, appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in

section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State of subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment

entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

As amended Pub.L. 94-73, Title II, §§ 204, 206, Title IV, § 405, Aug. 6, 1975, 89 Stat. 402. 404.

APPENDIX D

Elections, Municipal

34A-102. Application of Code.—This Code shall apply to any general or special election in every municipal corporation of this State to fill any municipal office, and to any general or special municipal primary, if any, to nominate candidates for any such office, to any election to submit a question to the people, and to any other municipal election or primary for any other purpose whatsoever. Except as specifically provided in this Code, its provision shall take precedence over municipal charter provisions which are in conflict herewith.

(Acts 1968, pp. 885, 887.)

34A-902. Candidate required to designate specific office sought in certain cases.—In the case of a candidate seeking one of two or more public offices each having the same title and to be filled at the same election by the vote of the same electors, charter or ordinance provisions now in effect or hereinafter enacted shall govern whether such candidate shall designate the specific office he is seeking. If required to designate the specific office, the candidate shall name his incumbent or give other appropriate designation. Such designation shall be entered on the ballot and ballot labels in such manner that in the ensuing primary or election such candidate shall only oppose the other candidate or candidates, if any, designating the same specific office.

(Acts 1968, pp. 885, 913.)

34A-1407 Municipal charter to govern vote required for nomination; runoff primary or election

(a) If the muncipal charter or ordinance, as now existing or as amended subsequent to the effective date of this subsection, provides that a candidate may be nominated or

elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office.

(b) In instances where no candidate receives a majority of the votes cast and the municipal charter or ordinance does not provide for nomination or election by a plurality vote, a runoff primary or election shall be held, between the two candidates receiving the highest number of votes. Such runoff shall be held not earlier than the fourteenth day and not later than the twenty-first day after the day of holding the first primary or election on a date specified by ordinance or resolution, unless such runoff date is postponed by court order. Only the electors entitled to vote in the first primary or election shall be entitled to vote in any runoff primary or election resulting therefrom; provided, however, that no elector shall vote in a runoff primary in violation of section 34A-518. The candidate receiving a majority of the votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner. The runoff primary or election shall be a continuation of the first primary or election and only those votes cast for the two candidates receiving the highest number of votes in the first primary or election shall be counted. No write-in votes may be cast in a primary, runoff primary, or runoff election. If the candidate receiving the highest number of votes withdraws, the remaining candidates receiving the two highest number of votes shall be the candidates in the runoff. If the candidate receiving the second highest number of votes withdraws, no runoff shall be held and the candidate receiving the highest number of votes shall be nominated or elected as the case may be. If any candidate elegible to be in a runoff dies, or one of the two candidates originally receiving the highest number of votes is found to be ineligible, the remaining candi-

dates receiving the two highest number of votes shall be the candidates in such runoff. The candidate receiving the highest number of the votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner. The name of a write-in candidate eligible for election in a runoff shall be printed on the runoff election ballot in the independent column.

(c) In all cities having a population in excess of 100,000, according to the latest United States Decennial Census, in order for a candidate to be nominated for public office in any primary or elected to public office in any election, he must receive a majority of the votes cast to fill such nomination or public office.

(Acts 1968, pp. 885, 977; 1970, pp. 341, 344; 1974, pp. 82, 94; 1978, pp. 1025, 1031, eff. March 14, 1978.)

APPENDIX E

Georgia Laws 1966 Session

CITY OF ROME—ELECTION OF COMMISSIONERS.

No. 125 (House Bill No. 547).

An Act to amend section 4 of the Act approved August 19, 1918 (Ga. L. 1918, p. 813-885) creating a new charter and municipal government for the City of Rome, by striking section 4 of said Act and substituting in lieu thereof a new section 4 (a) (b) (c) (d) and (e); to provide that each ward of the City of Rome shall consist of post no. 1, post no. 2, and post no. 3 for election purposes; that a candidate for election shall designate the ward and post number for which he is a candidate; to provide the term of office of said commissioners; to provide that commissioners shall be elected by a majority of the consolidated vote of the entire city; to provide for the term of office of the present city commissioners; to provide the method for filing vacancies on said city commission; and to repeal all conflicting laws; and for other purposes.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same:

Section 1. That section 4 of the Act approved August 19, 1918 (Ga. L. 1918, p. 813-885) creating a new charter and municipal government for the City of Rome, be and the same is hereby repealed in its entirety by substituting in lieu thereof a new section 4 (a) (b) (c) (d) and (e), reading as follows:

"Section 4 (a). Be it enacted by the authority aforesaid, that an election shall be held in said city on the first Tuesday in December 1968, to elect said commissioners who shall hold office from January 1969 until the time as hereinafter

set forth and until their successors are duly and legally qualified.

(b). Be it further enacted by the authority aforesaid, that the elected candidate from post no. 1 of each of the three wards of the City of Rome shall be elected on the first Tuesday in December 1968, to serve and hold office from the first Monday in January 1969 until the first Monday in January 1975. The elected candidate from post no. 2 of each of the three wards of the City of Rome shall be elected on the first Tuesday in December 1965, to serve and hold office from the first Monday in January 1969 until the first Monday in January 1973. The elected candidate from post no. 3 of each of the three wards of the City of Rome shall be elected on the first Tuesday in December 1968, to serve and hold office from the first Monday in January 1969 until the first Monday in January 1971.

(c). Be it further enacted by the authority aforesaid, that if a candidate for the Rome city commission does not receive a majority of all the consolidated votes of the entire city cast in said election for the post for which he qualified as a candidate, a run-off election shall be held between the two candidates receiving the largest and greatest number of votes within 15 days after the regular election.

(d). Be it further enacted by the authority aforesaid, that after the initial election on the first Tuesday in December 1968, at the termination of the then elected commissioners' terms, as hereinbefore set forth, the commissioners of the city shall be elected for terms of four (4) years thereafter, or until their successors are duly elected and qualified. Said subsequent elections are to be held on the first Tuesday in December of each year and said commissioners shall serve and hold office for a term of four (4) years from the first Monday in January of the year they assume office.

(e). Provided, however, notwithstanding any other provision of the charter of the City of Rome, and this amend-

ment to said charter, the present members of the city commission of the City of Rome, Georgia shall continue in office until the first Monday in January 1969, or until their successors are elected and qualified. In the event that a vacancy occurs prior to the first Monday in January 1969, or thereafter, the vacancy shall be filled as is now provided by the charter of the City of Rome (Ga. L. 1943, pp. 1559-1560)."

Section 2. All laws or parts of laws in conflict with this Act are hereby repealed.

Section 3. The affidavit and notice hereto attached is made a part of this bill, and reference is made thereto.

Notice of Local Legislation.

To the Citizens of Rome, Floyd County, Georgia:

In the General Assembly of Georgia for the year 1966, bills will be introduced to amend the charter of the City of Rome in the following particulars:

1. To reduce the number of wards in the City of Rome from nine (9) to three (3) wards. The first ward to be that portion of the city lying between the center line of Etowah River and the center line of the Oostanaula River; the second ward to be that portion of the city lying between the center line of the Etowah River and the center line of the Coosa River; and the third ward to be that portion of the city lying between the center line of the Coosa River and the center line of Oostanaula River.

2. To provide that each ward of the City of Rome shall have three (3) members of the Rome city commission and that the election of said commission shall be on a staggered basis and after the first election, each commissioner shall be elected for a four (4) year term.

3. To change the composition of the Rome board of education from five (5) members to six (6) members and pro-

vide that they shall be elected for staggered terms with two (2) members to be elected from each of the three wards of the City of Rome.

4. To provide that a person running for election to the Rome city commission in the general election must have been nominated by a political party in a primary held by said political party by means of a primary election, to be placed on the ballot for the general election for the Rome city commission shall have been nominated by petition signed by at least 10% of the total number of electors eligible to vote in the last general election for the Rome city commission.

5. To provide that by ordinance, the city may regulate elections in any manner not in conflict with the Constitution or the laws of the United States or the State of Georgia.

6. To provide that a citizen of Rome who has registered to vote may vote whether or not said citizen has paid all taxes, fines, forfeitures or other indebtedness due said city.

This 13th day of December, 1965.

Mrs. Ray Beard
Secretary, Rome City
Commission.

Georgia, Floyd County.

Personally appeared before the undersigned official authority to administer oaths, Sidney Lowrey, who, on oath states that he is a member of the General Assembly from Floyd County, and is the author of the local bill to which this affidavit is attached; and that a notice of the intention to apply for the legislation outlined in said bill has been published in the Rome News Tribune, a newspaper in which the sheriff's advertisements for the locality affected by said bill, are published, once a week for three

weeks during a period of sixty days immediately preceding its introduction into the General Assembly; and that the copy of said notice as published in said paper is hereto attached and made a part of said bill; and that said notice was published as provided by law.

This 2nd day of February, 1966.

/s/ Sidney Lowrey

Sworn to and subscribed before me,
this 2nd day of February, 1966.

/s/ Amelia Smith,
Notary Public, Georgia, State at Large.
My Commission expires Oct. 5, 1968.
(Seal).

Approved February 28, 1966.

CITY OF ROME—CITY COMMISSIONERS, ELECTION, SALARIES, ETC.

No. 127 (House Bill No. 546).

An Act to amend section 3, as amended, of the Act approved August 19, 1918 (Ga. L. 1918, p. 813-885) creating a new charter and municipal government of the City of Rome, be amended by striking said section 3 and its amendments in their entirety and substituting a new section 3 thereof; to provide the qualifications of the members of the Rome city commissioners; to provide the salary of said commissioners; to provide for the organization of said commission; to provide that each of the three wards of the City of Rome shall elect three city commissioners; to provide that each ward shall have elective post for said commissioner to be designated as post no. 1, post no. 2, and post no. 3;

to provide that a candidate for the city commission shall designate which post of a ward he is standing for election; to repeal all laws in conflict therewith; and for other purposes.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same:

Section 1. That section 3, as amended, of the Act approved August 19, 1918 (Ga. L. 1918, p. 813-885), creating a new charter and municipal government for the City of Rome, be and the same is hereby repealed in its entirety by substituting in lieu thereof a new section 3 reading as follows:

"Section 3. Be it further enacted by the authority aforesaid, that the governing and legislative authority of said city shall be vested in a commission of nine members. The members of said commission shall have attained the age of twenty-one (21) years, and shall have been residents and citizens of said city for at least two years next preceding their election, and shall be qualified voters and electors of the City of Rome and must also at the time of their qualification for election as a city commissioner have been a registered voter and elector of the City of Rome at least ninety (90) days prior to their qualification. The members of said commission at the time of and during their continuance in office shall be bona fide residents and citizens of said City of Rome and the Ward from which they are elected. Each member of said commission shall receive a salary of fifteen hundred ($1,500.00) dollars per annum. At their first meeting, or as soon thereafter as possible, the members of said commission shall elect one of their number as chairman, who shall receive an additional salary of six hundred ($600.00) dollars per annum. The chairman, or in his absence, the chairman pro tempore, shall preside over the deliberations of the commission and shall have the

right to vote on all questions; he shall preserve order and decorum at all meetings of the commission and shall enforce the rules of that body; and shall have power to punish all persons for contempt of such rules; and shall perform all other duties incident to his office. Service of legal process directed to or against the city shall be served upon the chairman of the commission. Three of said commissioners from each Ward of the city shall be elected by a majority of the consolidated vote of the entire city. Each of the three Wards of the City of Rome shall have three (3) elective posts for the election of said commissioners. Each elective post shall be designated as post no. 1, post no. 2, or post no. 3. Any person offering himself as a candidate for election as a city commissioner shall specifically designate and qualify in the ward in which he is domiciled as being a candidate for post no. 1, post no. 2, or post no. 3 of his ward."

Section 2. All laws or parts of laws in conflict with this Act are hereby repealed.

Section 3. The affidavit and notice hereto attached is made a part of this bill, and reference is made thereto.
Georgia, Floyd County.

Personally appeared before the undersigned official authorized to administer oaths, Sidney Lowrey, who, on oath states that he is a member of the General Assembly from Floyd County, and is the author of the local bill to which this affidavit is attached; and that a notice of the intention to apply for the legislation outlined in said bill has been published in the Rome News Tribune, a newspaper in which the sheriff's advertisements for the locality affected by said bill are published, once a week for three weeks during a period of sixty days immediately preceding its introduction into the General Assembly; and that the copy of said notice as published in said paper is hereto attached and

made a part of said bill; and that said notice was published as provided by law.

This 2nd day of February, 1966.

/s/ Sidney Lowrey

Sworn to and subscribed before me,
this 2nd day of February, 1966.

/s/ Amelia Smith,
Notary Public, Georgia, State at Large.
My Commission expires Oct. 5, 1968.
(Seal).

Notice of Local Legislation.

To the Citizens of Rome, Floyd County, Georgia:

In the General Assembly of Georgia for the year 1966, bill will be introduced to amend the charter of the City of Rome in the following particulars:

1. To reduce the number of wards in the City of Rome from nine (9) to three (3) wards. The first ward to be that portion of the city lying between the center line of the Etowah River and the center line of the Oostanaula River; the second ward to be that portion of the city lying between the center line of the Etowah River and the center line of the Coosa River; and the third Ward to be that portion of the city lying between the center line of the Coosa River and the center line of the Oostanaula River.

2. To provide that each ward of the City of Rome shall have three (3) members of the Rome city commission and that the election of said commission shall be on a staggered basis and after the first election, each commissioner shall be elected for a four (4) year term.

3. To change the composition of the Rome board of education from five (5) members to six (6) members and provide that they shall be elected for staggered terms with

two (2) members to be elected from each of the three wards of the City of Rome.

4. To provide that a person running for election to the Rome City Commission in the general election must have been nominated by a political party in a primary held by said political party, or that any person's name not nominated by a political party by means of a primary election, to be placed on the ballot for the general election for the Rome city commission shall have been nominated by petition signed by at least 10% of the total number of electors eligible to vote in the last general election for the Rome city commission.

5. To provide that by ordinance, the city may regulate elections in any manner not in conflict with the Constitution or the laws of the United States or the State of Georgia.

6. To provide that a citizen of Rome who has registered to vote may vote whether or not said citizen has paid all taxes, fines, forfeitures or other indebtedness due said city.

This 13th day of December, 1965.

/s/ Mrs. Ray Beard
Secretary, Rome City
Commission

Approved February 28, 1966.

CITY OF ROME—BOARD OF EDUCATION.

No. 255 (House Bill No. 545).

An Act to amend section 84 of the Act approved August 19, 1918 (Ga. L. 1918, pp. 813-885) creating a new charter and municipal government for the City of Rome, by repealing section 84 in its entirety and substituting in lieu thereof a new section 84 (a) (b) (c) (d) (e) (f)

and (g); to provide that the board of education of the City of Rome shall be composed of six (6) members; that each ward of the City of Rome shall elect two (2) members to said board; to provide the qualifications of the candidate for the board of education; to provide that there shall be a post no. 1 and post no. 2 from each ward for the board of education; to provide that the board of education shall be elected by a majority of the consolidated votes of the City of Rome; to provide for a run-off election for the board of education; to provide the present and future terms of the board of education; to provide for the election dates of the board of education; to repeal all laws in conflict therewith; and for other purposes.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same:

Section 1. That section 84 of the Act approved August 19, 1918 (Ga. L. 1918, pp. 813-885) creating a new charter and municipal government for the City of Rome, be and the same is hereby repealed in its entirety and substituting in lieu thereof a new section 84 (a) (b) (c) (d) (e) (f) and (g), reading as follows:

"Section 84 (a). Be it enacted by the authority aforesaid, that a board of education to consist of six (6) members, be, and the same is hereby established and that each of the three wards of said city shall have two members of the board of education. The members of said board at the time of and during their continuance in office, shall be bona fide residents and citizens of said City of Rome and the ward from which they are elected, and must also at the time of their qualification for election have been a registered voter and elector of the City of Rome at least ninety (90) days prior to their qualification for election. Vacancy or vacancies in said board of education caused by death, resignation,

removal, disqualification, or otherwise, shall be filled by a majority vote of the remaining members of said board.

(b). Be it further enacted by authority aforesaid, that for the purpose of the election of the members of the board of education, each ward of the City of Rome shall be divided for said election into post no. 1 and post no. 2. A candidate for election shall qualify and be a candidate for either post no. 1 or post no. 2, as designated by said candidate upon his qualification as a candidate.

(c). Be it further enacted by authority aforesaid, that the election of all the members of the board of education of the City of Rome shall be by a majority of the consolidated votes of the entire city.

(d). Be it further enacted by authority aforesaid, that if a candidate for the board of education does not receive a majority of all the consolidated votes of the entire city cast in said election for the post for which he qualified as a candidate, a run-off election shall be held between the two candidates receiving the largest or greatest number of votes within fifteen (15) days after the regular election.

(e). Be it further enacted by authority aforesaid, that the present board of education of said city shall continue in office until the first Monday in April 1967, or until their successors are elected and qualified. That on the first Tuesday in March 1967, an election shall be held to elect the members of the board of education. The candidate elected for post no. 1 of each ward of the City of Rome shall serve from the first Monday in April 1967 until the first Monday in January 1973, or until their successors are elected and qualified. The candidate elected for post no. 2 of each ward of the City of Rome shall serve from the first Monday in April 1967 until the first Monday in January 1971, or until their successors are elected and qualified.

(f). Be it further enacted by authority aforesaid, that after the initial election on the first Tuesday in March

1967, at the termination of the then elected board members' terms, as hereinbefore set forth, the members of the board shall be elected for terms of four years thereafter, or until their successors are duly elected and qualified. Said subsequent elections to be held on the first Tuesday in December of each year and said board members shall serve and hold office for a term of four years from the first Monday in January or the year they assume office.

(g). Provided, however, notwithstanding any other provision of the charter of the City of Rome, a candidate for the board of education may have his name placed on the ballot for the general election to be held on the first Tuesday in March, 1967 for the election of the board of education without having been nominated in a primary election or having been nominated by a nomination petition. However, any candidate desiring to stand for such election shall register and qualify with the secretary of the Rome city commission at least 30 days prior to the election. A majority of the consolidated votes cast in the entire city in said election shall be necessary for election."

Section 2. All laws or parts of laws in conflict with this Act are hereby repealed.

Section 3. The affidavit and notice hereto attached is made a part of this bill, and reference is made thereto.

Notice of Local Legislation.

In the General Assembly of Georgia for the year 1966, bills will be introduced to amend the charter of the City of Rome in the following particulars:

1. To reduce the number of wards in the City of Rome from nine (9) to three (3) wards. The first ward to be that portion of the city lying between the center line of the Etowah River and the center line of the Oostanaula River; the second ward to be that portion of the city lying between the center line of the Etowah River and the center line of

the Coosa River; and the third ward to be that portion of the city lying between the center line of the Coosa River and the center line of the Oostanaula River.

2. To provide that each ward of the City of Rome shall have three (3) members of the Rome city commission and that the election of said commission shall be on a staggered basis and after the first election, each commissioner, shall be elected for a four (4) year term.

3. To change the composition of the Rome board of education from five (5) members to six (6) members and provide that they shall be elected for staggered terms with two (2) members to be elected from each of the three wards of the City of Rome.

4. To provide that a person running for election to the Rome city commission in the general election must have been nominated by a politcal party in a primary held by said political party by means of a primary election, to be placed on the ballot for the general election for the Rome city commission shall have been nominated by petition signed by at least 10% of the total number of electors elgible to vote in the last general election for the Rome city commission.

5. To provide that by ordinance, the city may regulate elections in any manner not in conflict with the Constitution or the laws of the United States or the State of Georgia.

6. To provide that a citizen of Rome who has registered to vote may vote whether or not said citizen has paid all taxes, fines, forfeitures or other indebtedness due said city.

This 13th day of December, 1965.

Mrs. Ray Beard
Secretary,
Rome City Commission

Georgia, Floyd County.

Personally appeared before the undersigned official authorized to administer oaths, Sidney Lowrey, who, on oath, states that he is a member of the General Assembly from Floyd County, and is the author of the local bill to which this affidavit is attached; and that a notice of the intention to apply for the legislation outlined in said bill has been published in the Rome News Tribune, a newspaper in which the sheriff's advertisements for the locality affected by said bill are published, once a week for three weeks during a period of sixty days immediately preceding its introduction into the General Assembly; and that the copy of said notice as published in said paper is hereto attached and made a part of said bill; and that said notice was published as provided by law.

This 2nd day of February, 1966.

/s/ Sidney Lowrey

Sworn to and subscribed before me,
this 2nd day of February, 1966.

/s/ Amelia Smith,
Notary Public, Georgia, State at Large.
My Commission expires Oct. 5, 1968.
(Seal).

Approved March 2, 1966.

CITY OF ROME—ELECTIONS.

No. 350 (House Bill No. 550).

An Act to amend section 16 of the Act approved August 19, 1918 (Ga. L. 1918, p. 813-885) creating a new charter and municipal government for the City of Rome, by striking section 16 in its entirety and substituting in lieu thereof a new section 16 (a) (b) (c) (d) (e) and (f); to provide for primary elections and the nomination of candidates for any general election and special election by primary or nomination petition; to provide for the form of said nomination petition and the number of signatures (10%) necessary for nomination; to provide for the qualifications of the electors signing nomination petition; to provide the time period for the circulation of said nomination petition and its being filed with the secretary of the Rome City Commission; to provide for the certification of a nominee of political party or organization to the secretary of the Rome City Commission; to provide for the closing of the voting registration prior to any election; to provide that by ordinance the Rome City Commission may regulate and control both primary and general elections in any manner not in conflict with the Constitution and the laws of the United States and the State of Georgia; to repeal all laws in conflict therewith; and for other purposes.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same:

Section 1. That section 16 of the Act approved August 19, 1918 (Ga. L. 1918, p. 813-885) creating a new charter and municipal government for the City of Rome, be and the same is hereby repealed in its entirety and substituting in lieu thereof a new section 16 (a) (b) (c) (d) (e) and (f), reading as follows:

"Section 16 (a). Be it further enacted by the authority aforesaid, That any party or political organization may hold a primary election for the nomination of candidates, or the expression of party policy, for any general or special election, provided such primary shall be held in accordance with the laws of the State and of this charter for general elections.

(b) Provided, however, that notwithstanding any other provision of the charter of the City of Rome for a person to be certified by a party or political organization as a

candidate for any elective office of the City of Rome, the person so certified must have received a majority of the votes cast in a primary election held by said party or political organization. In addition to the party nominations made at primaries, nominations of candidates for public office of the City of Rome may also be made by nomination petition signed by electors and filed in the manner hereinafter provided. Such petition shall be in the form prescribed by the secretary of the Rome City Commission with whom they shall be filed and no other form than the one so prescribed shall be used for such purposes. Said nomination petition shall be submitted to and filed with the Secretary of the Rome City Commission at least thirty (30) days prior to the election.

(c) A nominating petition of a candidate shall be signed by a number of electors of not less than fifteen per centum of the total number of electors eligible to vote in the last general election for the filling of the office the candidate is seeking.

(d) Each person signing a nomination petition shall declare therein that he is a duly qualified and registered elector and voter of the City of Rome entitled to vote in the next general election for a filling of the office sought by the candidate supported by the petition, and shall add to his signature his residence address. No person shall sign the same petition more than once. Each petition shall support the candidacy of only a single candidate. No nomination petition shall be circulated prior to 120 days before the last day on which such may be filed and no signature shall be counted unless it was signed within 120 days of the last day for filing the same. A nominating petition shall not be amended or supplemented after its presentation with the appropriate office for filing.

(e) Provided further, if a candidate for any elective office of the City of Rome is nominated by a political party or organization in a primary election held for such purpose,

the chairman or governing body of such political party or organization shall certify to the secretary of the Rome City Commission, in writing, the names of the elected nominee or nominees of such political party at least 30 days prior to the general election in which said nominee or nominees shall be candidates for an elective office of the City of Rome.

Fifteen (15) days prior to a general election, the registration of voters for the purpose of voting in said general election shall be closed and the secretary of the Rome City Commission shall furnish the managers of elections a complete list of voters as provided in Ga. Laws 1918, pp. 813-885, Sec. 7.

(f) Be it further enacted by the authority aforesaid, that the Rome City Commission may by ordinance regulate and control both primary and general elections in any manner not in conflict with the Constitution and laws of the United States and the State of Georgia."

Section 2. All laws or parts of laws in conflict with this Act are hereby repealed.

Section 3. The affidavit and notice hereto attached is made a part of this bill, and reference is made thereto.

Notice of Local Legislation.

In the General Assembly of Georgia for the year 1966, bills will be introduced to amend the charter of the City of Rome in the following particulars:

1. To reduce the number of wards in the City of Rome from nine (9) to three (3) wards. The first ward to be that portion of the city lying between the center line of the Etowah River and the center line of the Oostanaula River; the second ward to be that portion of the city lying between the center line of the Etowah River and the center line of the Coosa River; and the third ward to be that portion of the city lying between the center line of the Coosa River and the center line of the Oostanaula River.

2. To provide that each ward of the City of Rome shall have three (3) members of the Rome City Commission and that the election of said commission shall be on a staggered basis and after the first election, each commissioner shall be elected for a four (4) year term.

3. To change the composition of the Rome Board of Education from five (5) members to six (6) members and provide that they shall be elected for staggered terms with two (2) members to be elected from each of the three wards of the City of Rome.

4. To provide that a person running for election to the Rome City Commission in the general election must have been nominated by a political party in a primary held by said political party by means of a primary election, to be placed on the ballot for the general election for the Rome City Commission shall have been nominated by petition signed by at least 10% of the total number of electors eligible to vote in the last general election for the Rome City Commission.

5. To provide that by ordinance, the city may regulate elections in any manner not in conflict with the Constitution or the laws of the United States or the State of Georgia.

6. To provide that a citizen of Rome who has registered to vote may vote whether or not said citizen has paid all taxes, fines, forfeitures or other indebtedness due said city.

This 13th day of December, 1965.

Mrs. Ray Beard
Secretary,
Rome City Commission

Georgia, Floyd County.

Personally appeared before the undersigned official authorized to administer oaths, Sidney Lowrey, who, on oath states that he is a member of the General Assembly from

Floyd County, and is the author of the local bill to which this affidavit is attached; and that a notice of the intention to apply for the legislation outlined in said bill has been published in the Rome News Tribune, a newspaper in which the sheriff's advertisements for the locality affected by said bill are published, once a week for three weeks during a period of sixty days immediately preceding its introduction into the General Assembly; and that the copy of said notice as published in said paper is hereto attached and made a part of said bill; and that said notice was published as provided by law.

This 2nd day of February, 1966.

/s/ Sidney Lowrey

Sworn to and subscribed before me,
this 2nd day of February, 1966.

/s/ Amelia Smith,
Notary Public, Georgia State at Large.
My Commission expires Oct. 5, 1968.
(Seal).

Approved March 4, 1966.

CITY OF ROME—ELECTIONS.

No. 579 (House Bill No. 95).

An Act to amend the charter of the City of Rome, Georgia as passed by the General Assembly of Georgia and approved August 19, 1918 (Ga. L. 1918, pp. 813-885), by amending an Act amending said charter as approved February 28, 1966 (Ga. L. 1966, pp. 2375-2378) by striking the year "1965" as it appears in line 5, page 2376 of said 1966 Georgia Laws, and substituting therefor the

year "1968"; to repeal all laws in conflict therewith; and for other purposes.

Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same:

Section 1. That the subsection designated as section 4(b) of an amendment to the charter of the City of Rome (Ga. L. 1918, pp. 813-885) as passed by the General Assembly of Georgia and approved February 28, 1966 (Ga. L. 1966, pp. 2375-2378) be and the same is hereby amended by striking the year "1965" as it appears in line 5, page 2376 of said amendment of 1966 and substituting therefor the year "1968" so that subsection (b) of section 4 of said 1966 amendment shall read as follows:

"Section 4. (b) Be it further enacted by the authority aforesaid, that the elected candidate from post No. 1 of each of the three wards of the City of Rome shall be elected on the first Tuesday in December 1968, to serve and hold office from the first Monday in January 1969 until the first Monday in January 1975. The elected candidate from post no. 2 of each of the three wards of the City of Rome shall be elected on the first Tuesday in December 1968, to serve and hold office from the first Monday in January 1969 until the first Monday in January 1973. The elected candidate from post no. 3 of each of the three wards of the City of Rome shall be elected on the first Tuesday in December, 1968, to serve and hold office from the first Monday in January, 1969 until the first Monday in January, 1971."

Section 2. All laws and parts of laws in conflict herewith are hereby repealed.

Section 3. The affidavit and notice hereto attached is made a part of this bill, and reference is made thereto.

Georgia, Floyd County.

Personally appeared before the undersigned official authorized to administer oaths, Richard L. Starnes, Jr., who,

on oath states that he is a member of the General Assembly from Floyd County, and is the author of the local bill to which this affidavit is attached; and that a notice of the intention to apply for the legislation outlined in said Bill has been published in the Rome News Tribune, a newspaper in which the Sheriff's advertisements for the locality affected by said Bill are published, once a week for three weeks during a period of sixty days immediately preceding its introduction into the General Assembly; and that the copy of said notice as published in said paper is hereto attached and made a part of said Bill; and that said notice was published as provided by law.

This 18th day of January, 1967.

/s/ Richard L. Starnes, Jr.
by June Slover
Witness
Carolyn H. Norris
Jerry L. Minge

Sworn to and subscribed before me,
this 18th day of January, 1967.

/s/ Jerry L. Minge
Notary Public, Floyd County, Ga.
My Commission Expires August 7, 1967.

Notice of Local Legislation.

To the Citizens of Rome, Floyd County, Georgia:

In the General Assembly of Georgia for the year 1967, a bill will be introduced to amend the charter of the City of Rome in the following particulars:

To amend the amendment of the charter of the City of Rome approved February 28, 1966, as set forth in Georgia Laws 1966, pp. 2375-2378, by correcting a typogaphical error appearing in line 5, page 2376, said Georgia Laws, by deleting the year "1965" appearing therein and substi-

tuting therefor the year "1968". Said correction shall provide that the city commissioners of post 2 of each ward shall be next elected on the first Tuesday in December of 1968 rather than on the first Tuesday in December, 1965.

City of Rome

By: /s/ Mrs. Ray Beard
Secretary, Rome
City Commission

Approved April 21, 1967.

CITY OF ROME—ELECTIONS.

No. 979 (House Bill No. 1450).

An Act to amend an Act approved August 19, 1918 (Ga. L. 1918, pp. 813-885), creating a new charter and municipal government for the City of Rome, as amended, and especially to amend section 1 of an Act approved February 28, 1966 (Ga. L. 1966, p. 2375), providing for election of commissioners on a staggered basis, so as to provide that the city general elections be held on the Tuesday next following the first Monday in November in the year next preceding the expiration of the term; to provide that a run-off election be governed by the Georgia Municipal Election Code; to repeal conflicting provisions; and for other purposes.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same:

Section 1. That subsection 4(c) of an Act approved August 19, 1918 (Ga. L. 1918, pp. 813-885), as amended by an Act approved February 28, 1966 (Ga. L. 1966, pp. 2375, 2378), providing for election of commissioners and fixing their terms, be, and the same is hereby, amended by striking subsection 4(c) in its entitrety and substituting in lieu thereof a new subsection 4(c) to read as follows:

Runoff elections.

"(c) Be it further enacted by the authority aforesaid, that if a candidate for the Rome City Commission does not receive a majority of all the consolidated votes of the entire city cast in said election for the post for which he qualified as a candidate, a run-off election shall be held between the two candidates receiving the highest number of votes. Such run-off shall be held as prescribed by the Georgia Municipal Election Code."

Section 2. That subsection 4(d) of an Act approved August 19, 1918 (Ga. L. 1918, pp. 813-885), as amended by an Act approved February 28, 1966 (Ga. L. 1966, pp. 2375-2378) providing for election of commissioners and fixing their terms, be, and the same is hereby, amended by striking subsection 4(d) in its entirety and substituting in lieu thereof a new subsection 4(d) to read as follows:

Terms of commissioners.

"(d) Be it further enacted by the authority aforesaid, that at the termination of the terms of the commissioners elected on the first Tuesday in December 1968, as hereinbefore set forth, commissioners of the city shall be elected for terms of four (4) years thereafter, or until their successors are duly elected and qualified. Said subsequent elections shall be held on the Tuesday next following the first Monday in November in the year next preceding the expiration of the term, and said commissioners shall serve and hold office for a term of four (4) years from the first Monday in January of the year they assume office."

Section 3. That all laws and parts of laws in conflict herewith be, and the same are hereby, repealed.

Section 4. That the published notice and accompanying affidavit attached hereto be and the same are hereby, by reference, made a part of this Bill.

Notice of Intention to Introduce Local Legislation.

Pursuant to Article III, Section 7, Paragraph 15, of the Constitution of Georgia of 1945, notice is hereby given that during the 1970 session of the Georgia General Assembly, a bill will be introduced to amend Georgia laws 1918, Act No. 522; Georgia Laws 1966, Act. No. 125; Georgia Laws 1967, Act. No. 579 (Section 5 of the Charter of the City of Rome) to provide that runoff elections be governed by the Georgia Municipal Election Code; to provide that the City general elections be held on the Tuesday next following the first Monday in November in the year next preceding the expiration of the term; to repeal conflicting provisions; and for other purposes.

Sam W. Doss, Jr.
Senator, 52nd District

Sidney Lowrey
Representative,
9th District, Post 1

Charles Graves
Representative,
9th District, Post 2

E. B. Toles
Representative,
9th District, Post 3

Georgia, Fulton County.

Personally appeared before me, the undersigned authority, duly authorized to administer oaths, Charles Graves who, on oath, deposes and says that he is Representative from the 9th District, and that the attached copy of notice of intention to introduce local legislation was published in

the Rome News-Tribune which is the official organ of Floyd County, on the following dates: January 15, 21, 28, 1970.

/s/ Charles Graves
Representative,
9th District

Sworn to and subscribed before me,
this 3rd day of February, 1970.

/s/ Gail Morris,
Notary Public, Georgia, State at Large.
My Commission Expires Dec. 22, 1973.
(Seal).

Approved March 12, 1970.

CITY OF ROME—CHARTER AMENDED.

No. 671 (House Bill No. 1025).

An Act to amend an Act creating a new charter and municipal government for the City of Rome, approved August 19, 1918 (Ga. L. 1918, p. 813), as amended, particularly by an Act approved March 2, 1966 (Ga. L. 1966, p. 2815), so as to provide that the election for members of the City Board of Education be held on the Tuesday next following the first Monday in November in the year next preceding the expiration of the term; to provide that a run-off election be governed by the Georgia Municipal Election Code; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. An Act creating a new charter and municipal government for the City of Rome, approved August 19, 1918 (Ga. L. 1918, p. 813), as amended, particularly by an Act approved March 2, 1966 (Ga. L. 1966, p. 2815), is hereby amended by striking subsection (d) of section 84 in its

entirety and substituting in lieu thereof a new subsection (d), to read as follows:

"(d) If a candidate for the Board of Education does not receive a majority of all the consolidated votes of the entire city cast in said election for the post for which he qualified as a candidate, a run-off election shall be held between the two candidates receiving the highest number of votes. Such run-off shall be held in accordance with the Georgia Municipal Election Code."

Section 2. Said Act is further amended by striking subsection (f) of section 84 in its entirety and by inserting in lieu thereof a new subsection (f), to read as follows:

"(f) Be it further enacted by the authority aforesaid that after the election on the first Tuesday in March, 1967, at the termination of the then elected Board members' terms, as hereinbefore set forth, the members of the Board shall be elected for terms of four (4) years, or until their successors are duly elected and qualified. All such elections, subsequent to the election held on the first Tuesday in December, 1970, shall be held on Tuesday next following the first Monday in November in the year next preceding the expiration of the term, and said Board members shall serve and hold office for a term of four (4) years from the first Monday in January of the year they assume office."

Section 3. All laws and parts of laws in conflict with this Act are hereby repealed.

Notice of Intention to Introduce Local Legislation.

Pursuant to Article III, section 7, Paragraph 15, of the Constitution of Georgia of 1945, notice is hereby given that during the 1971 session of the Georgia General Assembly, a bill will be introduced to amend Georgia Laws 1918, Act No. 522, section 84, and Ga. L. 1966, Act No. 255, section 1 (section 145 of the Charter of the City of Rome) to provide that runoff elections for the city Board of Education be governed by the Georgia Municipal Election Code; to provide that the elections for City Board of Education be held on the Tuesday next following the first Monday in November in the year next preceding the expiration of the term; to repeal conflicting provisions; and for other purposes.

Sam W. Doss, Jr.
Senator,
52nd District

Sidney Lowrey
Representative,
9th District, Post 1

John Adams
Representative,
9th District, Post 2

E. B. Toles
Representative,
9th District, Post 3

Georgia, Fulton County.

Personally appeared before me, the undersigned authority, duly authorized to administer oaths, John Adams who, on oath, deposes and says that he is Representative from the 9th District, and that the attached copy of Notice of Intention to Introduce Local Legislation was published in the Rome News-Tribune which is the official organ of Floyd County, on the following dates: January 21, 28 and February 4, 1971.

/s/ John Adams
Representative,
9th District

Sworn to and subscribed before me,
this 4th day of March, 1971.

/s/ Genevieve McKinney,
Notary Public, Georgia State at Large.
My Commission Expires Dec. 16, 1974.
(Seal).

Approved April 10, 1971.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION FILE No. 77-0797

CITY OF ROME, BRUCE HAMLER, and H. F. HUNTER, JR.,
Plaintiffs,

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

RECEIVED MAY 2, 1979

Notice is hereby given that City of Rome, Bruce Hamler, and H. F. Hunter, Jr., the Plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order granting Defendants' motion to dismiss Count V of Plaintiffs' Amended Complaint and dismissing Count V of Plaintiffs' Amended Complaint, rendered in this action on February 21, 1978 and entered on February 22, 1978, and from the final order denying Plaintiffs' Motion for Summary Judgment and granting that of Defendants on Counts I, II, III, IV, and VI of Plaintiffs' Amended Complaint and dismissing Plaintiffs' case, rendered in this action on April 3, 1979 and entered April 4, 1979.

This appeal is taken pursuant to 42 U.S.C. § 1973b and 42 U.S.C. § 1973c.

This 2 day of May, 1979.

/s/ Robert M. Brinson
Robert M. Brinson

/s/ William E. Sumner
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/s/ Joseph W. Dorn
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MOTION FILED
AUG 16 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1840

CITY OF ROME, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS CITY OF ROME, ET AL., AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS CITY OF ROME, ET AL.

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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1840

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UNITED STATES OF AMERICA, ET AL.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS CITY OF ROME, ET AL.

Pursuant to Supreme Court Rule 42, Pacific Legal Foundation respectfully moves this Court for leave to file the attached amicus curiae brief in support of appellants City of Rome, *et al.* Consent to the filing of this brief has been granted by the City of Rome, *et al.*, and has been lodged with the Clerk of this Court. Appellees United States, *et al.*, have withheld their consent, but have indicated that they will not oppose this motion.

Pacific Legal Foundation is a nonprofit, tax-exempt organization, incorporated under the laws of California, formed for the purpose of engaging in litigation in matters affecting the public interest. The Foundation has over 7,000 supporters and

contributors throughout the United States, many of whom reside in areas potentially subject to the statute at issue in this case. For this reason, the Foundation submits that it can add a broader perspective to this case which would aid the Court.

Pacific Legal Foundation believes that the federal government has broad authority under the Constitution and various statutes to eliminate racial discrimination. However, local governments should be restricted by this federal power only when circumstances compel such restriction and only when the facts justify it. Intrusion on the basic processes of localities can be justified by no less. In this particular case, a District Court has held that a 1% change in voting strength, which occurred without discriminatory purpose and which produced no change in voting balance, nonetheless triggered the harsh sanctions of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, thereby subjecting a city's basic political processes to federal interference. This result is justified neither by precedent nor by common sense.

For the foregoing reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

Respectfully submitted,

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CITY OF ROME, ET AL.,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS CITY OF ROME, ET AL.

INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States District Court for the District of Columbia, sitting as a three-judge court, was issued on April 9, 1979, and has not yet been published. *City of Rome v. United States,* No. 77-0797 (D.D.C. April 9, 1979). It is reprinted in Appellants' Jurisdictional Statement at 3b (hereinafter Opinion Below).

INTRODUCTION

The District Court refused to grant a declaratory judgment that, *inter alia,* 13 annexations made by Rome, Georgia, were without discriminatory purpose or effect under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The focus of this brief will be the Court's determination that these annexations "significantly alter[ed]" Rome's racial balance to the detriment of black voters. Opinion Below at 49b. The Court made this determination despite the undisputed fact, acknowledged by the Court, that these annexations were not motivated by any discriminatory purpose. *Id.* It was solely the numerical impact of these annexations which, according to the Court, required the imposition of sanctions under Section 5. Yet, as will be shown, the annexations in fact produced no more than a 1% reduction in the existing black minority vote.

The result of the Court's finding was to trigger the sanctions of Section 5. The potential scope of these sanctions is huge, ranging from judicial annulment of municipal annexations to the actual enjoinment of all local elections and referenda. Section 5 sanctions thus clearly affect functions which are basic to local government and lie at the heart of local autonomy.

Under the District Court's interpretation of Section 5, the most innocent of annexations, producing the most minimal of impacts upon racial voting strength, could nonetheless force a municipality to adopt judicially imposed conditions before it may resume normal political life. This result cannot be justified.

Before considering why precedent and policy reveal this determination to be erroneous, a brief review of the facts pertaining to the annexations is necessary. The 13 disputed annexations occurred during the ten-year period between November 1, 1964 (the effective date of Section 5), and February 10, 1975 (the date on which all annexations made by Rome after November 1, 1964, were submitted to the Attorney General). Opinion Below at 15b n.44.

Nine of the 13 annexations added no population to Rome at their inception. Initially, therefore, they were merely boundary changes and had no effect on Rome's racial balance. By February, 1978, however, 476 registered white voters and three registered black voters were living in these areas. Table, *id.* at 52b n.99.

The other four annexations initially added 288 registered white voters and no registered black voters. By February, 1978, these four areas had contributed 347 registered white voters and six registered black voters to Rome's population. *Id.*

The District Court based its finding that the annexations significantly altered the racial balance of Rome on a comparison of the population of the annexed areas, broken down by race, to the total population of Rome post-annexation. The Court observed that while 823 registered white voters lived in the annexed areas as of February, 1978, out of a total registered white population of 10,982, only nine registered black voters lived in those areas out of a total registered black population of 2,026. A comparison of the ratio of 823 to 10,982, characterized by the Court as "close to 10%" (in actuality it is 7.5%), to

the ratio of 9 to 2,026 (.4%) convinced the Court that the "impact on black voting strength [was] significant." *Id.* at 53b-54b.

However, if one looks at the impact of the annexations on the *total* voting population in Rome, a different picture emerges. In 1975 the total number of registered voters in Rome was 13,008, consisting of 10,982 whites (84.4%) and 2,026 blacks (15.6%). *Id.* As of February, 1978, all 13 annexed areas contained 823 registered whites and nine registered blacks. *Id.* at 53b. If one assumes that all of the annexations occurred in 1975, and the total population shift thus is reflected in the 1975 statistics, then the pre-1975, pre-annexation breakdown of total registered voters in Rome would be 10,159 whites (83.4%) and 2,017 blacks (16.6%). The change in Rome's racial composition caused by the annexations was thus, at most, *a 1% reduction of a black minority (from 16.6% to 15.6%) and a 1% addition to a white majority (from 83.4% to 84.4%)*. Yet this minimal change, which the Court found to be free of any discriminatory purpose, was held to constitute a discriminatory impact in violation of the Voting Rights Act.

ARGUMENT

I

A Municipal Annexation Which Does Not Significantly Alter a City's Racial Balance Does Not Have a Discriminatory Effect Under Section 5 of the Voting Rights Act

The annexations which this Court has found discriminatory have involved substantial changes in racial balance. In *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), the annexation effected "an almost complete reversal percentage-wise in [Petersburg's] racial

make-up." 354 F. Supp. at 1024. Before the annexation, Petersburg was 55% black and 45% white. After annexation, Petersburg was 46% black and 54% white. The premise upon which the District Court, and this Court by its affirmance, found discriminatory effect was the "transformation of a potential black voting majority into a clear minority" in the context of racial bloc voting and the unresponsiveness of the white-dominated city government to local black needs and desires. *Id.* at 1025. The Attorney General, in disapproving the annexation, objected to Petersburg's readoption of an at-large election system "in the context of a *significant* change of population—from white to black majority." *Id.* at 1023 n.2. (emphasis added). The implication is that annexations which cause *insignificant* population changes are not discriminatory.

In *City of Richmond v. United States*, 422 U.S. 358 (1975), a disputed annexation effected a similar drastic change in the city's racial composition. Richmond's pre-annexation population was 52% black and 48% white; its post-annexation population, 42% black and 58% white. A small black majority was thus transformed into a definite black minority. The Supreme Court held this otherwise discriminatory annexation permissible *only* because Richmond had discarded its at-large voting system in favor of a ward system. *Id.* at 371-72.

In *Beer v. United States*, 425 U.S. 130 (1976), this Court clarified its *City of Richmond* holding:

> "[T]he [*City of Richmond*] Court had to decide under what circumstances § 5 would permit a city to annex additional territory when that annexation would have the effect of changing the city's Negro population from a majority into a minority.... The *City of Richmond* case thus decided when a change with an adverse impact on previous Negro voting power met the 'effect' standard of § 5." *Id.* at 139 n.11.

Implicit in such a formulation is the idea that there may be changes with adverse impact on previous black voting power which *do not* meet Section 5's effect test.

Indeed, the District Court in the instant case decided that an annexation must *significantly* reduce the proportion of voters of a particular race before it can be characterized as having a discriminatory effect. Opinion Below at 51b, 53b. It thus implicitly recognized the nondiscriminatory nature of an annexation which insignificantly reduces a racial group's voting strength. No court, in the history of judicial interpretation of Section 5, has decided to the contrary.

II

Rome's Annexation, Increasing White and Reducing Black Proportional Voting Strength by 1%, Did Not Effect a Significant Alteration of that City's Racial Balance

A. *A 1% Change in Voting Strength Which Did Not Cause a Shift of a Racial Majority to a Minority Was Not a Significant Alteration*

This Court has never held as discriminatory an annexation which did not result in the transformation of a black majority into a minority. The occurrence of such a transformation was emphasized as the salient factor in prior annexation cases decided by the Supreme Court. *City of Petersburg,* 354 F. Supp. at 1025, *aff'd,* 410 U.S. 962; *City of Richmond,* 422 U.S. at 372; *Beer,* 425 U.S. at 139 n.11.

The only case to consider the application of Section 5 to annexations which changed a city's racial composition without overturning the pre-annexation racial majority was *Perkins v. Matthews,* 301 F. Supp. 565 (S.D. Miss. 1969), *rev'd on other grounds,* 400 U.S. 379 (1971), *on remand,* 336 F. Supp. 6 (S.D. Miss. 1971). Canton, Mississippi, through a series of annexations, had reduced but not eliminated a black voting majority. The District Court held that annexations which did not destroy black majorities were not violative of the Voting Rights Act. 301

F. Supp. at 567. On remand that Court noted: "Indeed, the Supreme Court recognized that this Court had found *no discriminatory purpose or effect* in the changes being litigated." 336 F. Supp. at 9 (emphasis added).

Rome's annexations changed its registered voting population from 83.4% white and 16.6% black to 84.4% white and 15.6% black. The pre-annexation racial majority did not shift; it was not even sizeably increased. Thus, as both the cases and the facts dictate, no significant alteration of the city's racial balance occurred.

B. *A 1% Change in Voting Strength Is a De Minimis Change and Not a Significant Alteration*

The methodology of the opinion below, holding a 1% addition to an already existing white voting majority discriminatory, was not based on any precedent. The Court simply compared the black and white voting populations in the annexed areas to their share of the total municipal electorate and arrived at a finding of significant alteration in Rome's racial balance. Opinion Below at 53b. Such a statistical method was rejected by the Supreme Court in *City of Richmond.* The Supreme Court stated:

> "We did *not* hold . . . that '[i]f the proportion of blacks in the new citizenry from the annexed area is appreciably less than the proportion of blacks living within the city's old boundaries . . . the voting power of black citizens as a class is diluted and thus abridged.'" *City of Richmond,* 422 U.S. at 368 (emphasis added) (citation omitted).

The *proper* comparison was whether "an annexation reduc[ed] the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation." *Id.* at 378.

The focus in an annexation case, as *City of Richmond* and *City of Petersburg* demonstrate, is not on the composition of the annexed areas but on that of *the total municipal unit* before and

after the annexation. The District Court stated the law properly when it noted that a discriminatory annexation must significantly reduce "the proportion of voters of a particular race." Opinion Below at 50b-51b. But the Court did not apply the law, failing even to calculate Rome's post-annexation racial composition. It is only by examining the pre- and post-annexation population figures in the context of a city's post-annexation political structure that a reasonable estimation of the effect on black voting strength can properly be made.

Had the District Court made such an examination, it would have been forced to conclude that the 1% shift was de minimis and therefore of negligible importance.[1] A 1% shift in certain narrow circumstances might be characterized as a significant alteration. If the racial voting blocs were evenly balanced prior to an annexation and a small addition in population gave one bloc an effective majority, then perhaps Section 5 could be properly applied to prevent the change. Here, however, a shift from an 83.4% to an 84.4% white voting majority, in the context of at-large elections, results in no practical dilution of black voting strength. It is difficult to imagine a situation in which any candidate's ability to be elected to municipal office would be significantly affected by such a change.

In the closely related area of reapportionment, it has been held that a claim of unconstitutional dilution of black or Hispanic voting strength is subject to a de minimis defense. In *Cousins v. City Council,* 503 F.2d 912 (7th Cir. 1974), *cert. denied,* 420 U.S. 992 (1975), the reapportionment of Chicago's wards was challenged on the grounds of racial and ethnic gerrymandering. The Court held that "a relatively small

[1] The District Court explicitly recognized the existence of a de minimis defense to Section 5: "[W]e will not treat these thirteen annexations as separate voting changes, in which case we would be compelled to sustain many of them as having *de minimis* effect only." Opinion Below at 53b. Had the District Court made the proper calculations, the cumulative impact of all the annexations would also have compelled a finding of de minimis effect.

reduction (2.5%) in the size of the approximately 30% black minority is insignificant as related to the issues here." 503 F.2d at 919. The Court also held that when a change in the territorial contours of an alderman's district resulted in the district having a 25% Puerto Rican population rather than one of 32%, that 7% difference was not "sufficiently substantial" to be a significant dilution of Puerto Rican voting strength. *Id.* at 921. The black population of the same district "would have increased only from approximately 1.4% to 1.7%" if the change had not been made. *Id.* The lower court's finding that "there was no significant diminution in black voting strength" was affirmed. *Id.*

Similarly, the one man, one vote rule, as interpreted by this Court, permits de minimis variations from absolute population equality in state and local legislative reapportionment. In *Abate v. Mundt,* 403 U.S. 182 (1971), a county reapportionment plan which deviated from population equality by 11.9% was upheld, this Court stating that "particular circumstances and needs of a local community ... may sometimes justify departures from strict equality." *Id.* at 185. In *Mahan v. Howell,* 410 U.S. 315 (1973), this Court held that a 16% deviation from population equality was constitutional since it was "based on legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 325, *quoting Reynolds v. Sims,* 377 U.S. 533, 579 (1964).[2]

[2] "Apart from those deviations from the one person, one vote standard that have been tolerated as *de minimis,* avoidable deviations have been sanctioned where designed to effectuate a substantive state policy deemed legitimate by the Court. Here, as was the case with the *de minimis* defense, different standards obtain with respect to state and local apportionment on the one hand and Congressional districting on the other." L. Tribe, *A Treatise on American Constitutional Law* 746 (1978).

Implicit in the existence of a different standard for state and local government is a notion of federal deference to legitimate state and local concerns. This Court has recently reaffirmed the constitutional principle that federal law may not supplant "functions essential to [a

(footnote continues)

C. *A 1% Change in Voting Strength Which Did Not Reduce a Minority's Political Effectiveness Was a Non-Retrogressive Change*

The Supreme Court put a further gloss on the meaning of discriminatory effect in Section 5 when it enunciated the non-retrogression rule in *Beer*. Under this rule, voting procedure changes which do not "lead to a retrogression" in the effective exercise of a racial minority's electoral franchise are permissible. *Beer*, 425 U.S. at 141. *Beer* cites the *City of Richmond* dissent, with apparent approval, for its assumption that "the fundamental objective of § 5 ... [is] the protection of *present* levels of voting *effectiveness* for the black population." *Beer*, 425 U.S. at 141 n.12, *quoting* 422 U.S. at 388 (latter emphasis added).

(footnote continued)

state's] separate and independent existence." *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976) (citation omitted). Municipal annexations fall within this class of functions:

> "A major purpose of annexation is to keep an entire urban area under the management of a single city government by extending city boundaries as fringe land is developed. Such unified management and planning of metropolitan regions permit services to be provided comprehensively with greater possible economy and may facilitate more effective land-use controls. In addition, certain types of urban malaise can be cured or controlled by annexation. These remedies include capturing the tax base which would otherwise be lost when new construction occurs on the city's fringe, eliminating 'tax colonies,' and curtailing the proliferation of cities which cause inequitable variations in service levels and tax rates." Lipsig, *Annexation Elections and the Right to Vote*, 20 U.C.L.A. L. Rev. 1093, 1093-94 (1973).

While the Fifteenth Amendment may supersede state and local autonomy in cases of blatant discrimination, the notions of federalism reflected in *Mahan v. Howell*, 410 U.S. 315 (1973), and *National League of Cities* dictate a restrained interpretation of federal power under that amendment where state and local governments have shown their actions to be without discriminatory purpose and without significant discriminatory impact.

The emphasis in *Beer* on comparisons of voting effectiveness before and after the challenged voting change is consistent with *City of Petersburg* and *City of Richmond*. It is important to note the distinction that while Section 5 protects the present level of voting effectiveness for the black population, it does not ensure that the present numerical level of the black population will remain constant. Section 5 does ensure that no voting change will be implemented that reduces a minority's effectiveness within its particular political environment. In *City of Richmond* and *City of Petersburg*, the combination of at-large electoral systems, the demonstrated unresponsiveness of the white-dominated governments to black concerns and pervasive racial bloc voting led this Court to conclude that the transformation of black majorities into minorities would significantly diminish their ability to achieve desired political results.

Rome's situation is dramatically different. The change in racial composition effected by Rome's annexations is de minimis. The District Court found that, while there was "a substantial measure of racial bloc voting" in Rome, the white officials *were* "responsive to the needs and interests of the black community." Opinion Below at 13b, 7b. The Court further noted:

> "[T]he facts recited by the Court in *City of Petersburg* reveal a far greater degree of racial polarization than is present in Rome's relatively benign racial atmosphere. And while Rome's elected officials have been quite responsive to the interests of the black community, the City Council of Petersburg was generally unresponsive to black needs." *Id.* at 55b.

The responsiveness of Rome's white elected officials to black concerns was established by a finding that the city had made an effort to upgrade black neighborhoods, had subsidized a city transit system that had a predominantly black ridership and had caused blacks to be employed on the city work force in

numbers approximately proportionate to their share of the population (including a number of blacks in skilled or supervisory positions). *Id.* at 7b-8b.

Given this political environment, in which a small black population has been successful in achieving moderate political objectives, it is unreasonable to believe that a tiny reduction in that population's voting strength would adversely affect its ability to achieve similar objectives in the future. The annexations, insofar as they reduced the proportional black vote by only 1% without adverse impact on the black community's political effectiveness, were non-retrogressive and thus non-discriminatory under Section 5.

CONCLUSION

The determination by the District Court that Rome's annexations had a discriminatory effect on black voting power in that city was erroneous. In basing its determination on a finding that a disproportionate number of Rome's white registered voters lived in the annexed areas as compared to the number of black voters who lived in those areas, the Court ignored Supreme Court precedent which mandated an examination of an annexation's effect upon the city's *total* population. The Court should have recognized that the enhancement of a white majority by 1%, increasing it from 83.4% to 84.4%, caused no significant alteration of Rome's racial balance. Instead, it was only a de minimis non-retrogressive alteration with no potential to significantly affect black voting power in Rome. The imposition of federal sanctions affecting basic local political processes cannot be based on such a miniscule impact unaccompanied by discriminatory intent.

For the reasons stated above, Pacific Legal Foundation urges the Court to reverse the decision of the District Court insofar as it pertains to Rome's annexations. The de minimis

impact on voting of these annexations, which were implemented for legitimate governmental reasons and without discriminatory purpose, should not trigger the sanctions of Section 5 of the Voting Rights Act.

Respectfully submitted,

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August, 1979

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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1840

CITY OF ROME, BRUCE HAMLER, and
H. F. HUNTER, JR., *Appellants,*

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL,
Attorney General of the United States, and
DREW S. DAYS III, Assistant Attorney General
of the United States, *Appellees.*

On Appeal From the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT FILED JUNE 7, 1979

JURISDICTION NOTED JULY 2, 1979

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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UNITED STATES OF AMERICA, GRIFFIN B. BELL,
Attorney General of the United States, and
DREW S. DAYS III, Assistant Attorney General
of the United States,

Appellees.

On Appeal From the United States District
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Portions of Deposition of E. J. Thomas, Jr. 331
Portions of Deposition of John Houser 338
Portions of Deposition of Napoleon Fielder 340
Portions of Deposition of Rev. Clyde Hill 345
Portions of Deposition of Elgin Carmichael 349
Portions of Deposition of James Loewen 355

Statutes

Sections 4 and 5 of the Voting Rights Act of 1975 appear beginning on page 1c of Appellants' Jurisdictional Statement.

Georgia Code Ann. Sections 34A-102, 34A-902, 34A-1407 (1970) appear beginning page 1d of Appellants' Jurisdictional Statement.

Georgia Laws 1966, pp. 2375-2378, 2382-2386, 2815-2819, 3083-3087; Georgia Laws 1967, pp. 3296-3298; Georgia Laws 1970, pp. 2563-2566; Georgia Laws 1971, pp. 3664-3666 appear beginning on page 1e of Appellants' Jurisdictional Statement.

Opinions

Opinion of the Three-Judge District Court below, City of Rome, et al. v. United States, et al., 450 E. Supp. 378 (D.D.C. 1978) appears beginning on page 1a of Appellants' Jurisdictional Statement.

Opinion of Three-Judge Court below, City of Rome, et al. v. United States, et al., CA 77-0797 (D.D.C. April 9, 1979), together with the Court's Order of April 4, 1979, appears in Appellants' Jurisdictional Statement beginning on page 1b.

Appellants' Notice of Appeal received on May 2, 1979 appears in Appellants' Jurisdictional Statement beginning on page 1f.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 9, 1977--Plaintiffs' complaint.

May 9, 1977--Application by Plaintiffs for three judge court.

July 12, 1977--Answer by Defendants to Plaintiffs' complaint.

July 12, 1977--Motion by Defendants to dismiss and request for oral hearing.

Sept. 23, 1977--Memorandum of law by Plaintiffs in opposition to Defendants' motion to dismiss.

Oct. 28, 1977--Motion of Defendants to dismiss heard and taken under advisement.

Nov. 10, 1977--Amended complaint of Plaintiffs.

Nov. 21, 1977--Answer of Defendants to amended complaint.

Nov. 21, 1977--Motion of Defendants to dismiss.

Dec. 7, 1977--First request of Plaintiffs for admission of facts and genuineness of documents.

Dec. 7, 1977--First request of Plaintiffs for production of documents and things by Defendants.

Dec. 7, 1977--First interrogatories of Plaintiffs to Defendants.

Dec. 14, 1977--First stipulation of facts of Plaintiffs and Defendants.

Dec. 28, 1977--Supplement of Plaintiffs to first amended complaint.

Dec. 30, 1977--Second request of Plaintiffs for admission of facts and genuineness of documents.

Dec. 30, 1977--Second interrogatories of Plaintiffs to Defendants.

Dec. 30, 1977--Second request of Plaintiffs for production of documents and things by Defendants.

Jan. 11, 1978--Response of Defendants to Plaintiffs' first request for admission of facts and genuineness of documents.

Jan. 11, 1978--Supplemental stipulation of facts of parties.

Jan. 11, 1978--Response of Defendants to Plaintiffs' first interrogatories.

Jan. 18, 1978--Response of Defendants to Plaintiffs' first request for production of documents and things.

Jan. 24, 1978--Response by Defendants to Plaintiffs' second request for admission of facts and genuineness of documents.

Jan. 24, 1978--Response by Defendants to Plaintiffs' second interrogatories.

Jan. 24, 1978--Interrogatories by Defendants to Plaintiffs.

Jan. 25, 1978--Motion of Defendants for a protective order to prevent the taking of the deposition of Frederick J. McGrath.

Jan. 31, 1978--Answer of Defendants to Plaintiffs' supplemental complaint.

Jan. 31, 1978--Motion of Plaintiffs to compel discovery.

Feb. 3, 1978--Response of Plaintiffs to Defendants' motion of extension of time.

Feb. 7, 1978--Motion of Plaintiffs for order that facts be taken as established.

Feb. 7, 1978--Response of Defendants to Plaintiffs' second request for production of documents and things.

Feb. 10, 1978--Response of Defendants to motion for order that facts be taken as established.

Feb. 10, 1978--Response of Defendants to motion to compel discovery.

Feb. 15, 1978--Amendment of Plaintiffs to motion to compel discovery.

Feb. 23, 1978--Memorandum and order granting Defendants' motion to dismiss Count V of the amended complaint, etc.

Feb. 24, 1978--Deposition of Donald Jackson.

Feb. 24, 1978--Deposition of C. W. Aycock.

Feb. 27, 1978--Deposition of Joe Wright.

Feb. 28, 1978--Amended response of Defendants to Plaintiffs' first request for admission of facts and genuineness of documents.

Mar. 7, 1978--Motion by Plaintiffs for reconsideration of this court's order of Feb 22, 1978.

Mar. 10, 1978--Amended response of Defendants to paragraph 16 of Plaintiffs' first set of interrogatories.

Mar. 13, 1978--Affidavits in support of pending motion for summary judgment and for all other proper purposes.

Mar. 13, 1978--Answers of Plaintiffs to Defendants' interrogatories.

Mar. 13, 1978--Third interrogatories of Plaintiffs.

Mar. 13, 1978--Third request of Plaintiffs to Defendants for production of documents and things.

Mar. 14, 1978--Requests of Defendants for admission of facts and genuineness of documents.

Mar. 14, 1978--Memorandum of Defendants to accompany filing of affidavits; affidavit of James W. Loewen; affidavit of John K. Tanner; affidavit of Harry Johnson, Jr.

Mar. 15, 1978--Affidavit of Mrs. Ray Beard in support of pending motion for summary judgment.

Mar. 15, 1978--Affidavit of Harry Johnson in support of pending motion for summary judgment.

Mar. 15, 1978--Answers of Plaintiffs to Defendants' interrogatories.

Mar. 31, 1978--Deposition of Horace Clary.

Mar. 31, 1978--Deposition of Bruce Hamler.

Apr. 3, 1978--Deposition of H. F. Hunter, Jr.

Apr. 3, 1978--Deposition of David Harvey.

Apr. 3., 1978--Deposition of Leon Wade.

Apr. 7, 1978--Responses of Plaintiffs to Defendants' requests for admission of facts and genuineness of documents.

Apr. 10, 1978--Deposition of Elgin Carmichael.

Apr. 10, 1978--Deposition of Samuel B. Stubbs.

Aor. 10, 1978--Deposition of John W. Houser, Jr.

Apr. 10, 1978--Deposition of Edwin Tanner.

Apr. 10, 1978--Deposition of Napoleon Fielder.

Apr. 10, 1978--Deposition of Rev. Clyde Hill.

Apr. 10, 1978--Deposition of E. J. Thomas, Jr.

Apr. 10, 1978--Deposition of Curtis W. Moreland.

Apr. 10, 1978--Deposition of James G. Wright.

Apr. 14, 1978--Response of Defandants to Plaintiffs' third request for production of documents and things.

Apr. 14, 1978--Response of Defendants to Plaintiffs' third interrogatories; affidavit of Carmen L. Jones

Apr. 17, 1978--Second supplement of Plaintiffs to first amended complaint.

Apr. 17, 1978--Affidavit of John M. Nanos in support of Plaintiffs' motion for summary judgment.

Apr. 18, 1978--Second motion of Plaintiffs to compel discovery together with memorandum of points and authorities.

Apr. 18, 1978--Copies of Hearings before Committee of House of Representatives on Extension of the Voting Rights Act submitted by Plaintiffs for inclusion in the record and consideration by the Court in support of Plaintiffs' motion for summary judgment and in opposition of Defendants' motion for summary judgment and for all other purposes.

Apr. 18, 1978--Deposition of John K. Tanner.

Apr. 18, 1978--Deposition of James W. Loewen.

Apr. 18, 1978--Status call wherein each side was ordered to file motion for summary judgment by May 8, 1978 with response by May 15, 1978.

Apr. 19, 1978--Report by all parties to the court on status of discovery.

Apr. 19, 1978--Second supplement to parties stipulation of facts.

Apr. 21, 1978--Response of Defendants to Plaintiffs' second supplement to their first amended complaint.

May 8, 1978--Motion of Plaintiff City of Rome and its officials for partial summary judgment.

May 8, 1978--Motion of private Plaintiffs for partial summary judgment.

May 15, 1978--Reply of Plaintiffs to statement of Defendants of material facts as to which Defendants contend there is no genuine issue.

May 15, 1978--Response of Plaintiffs to the Defendants' motion for summary judgment.

May 15, 1978--Response of Defendants to Plaintiffs' motion for summary judgment.

July 7, 1978--Cross-motions for summary judgment heard and taken under advisement.

July 12, 1978--Motion of Plaintiffs to file post argument brief.

July 12, 1978--Order directing the counsel for each party to prepare and file with the court six (6) copies of proposed findings of fact and conclusions of law within 10 days; directing each counsel to underline the proposed findings of fact and conclusions of law using a color code and file six marked copies of opposing counsel's proposed findings of fact and conclusions of law with the court within 10 days after receipt.

July 14, 1978--Motion of Defendants for extension of time to July 28, 1978 to file proposed findings of fact and conclusions of law.

July 18, 1978--Post-argument brief of Plaintiffs.

July 18, 1978--Response of Plaintiffs to Defendants' motion for extension of time.

July 24, 1978--Order filed July 20, 1978 extending time for all parties to file proposed findings of fact and conclusions of law until July 28, 1978.

July 28, 1978--Proposed findings of fact and conclusions of law of Plaintiffs.

July 28, 1978--Proposed findings of fact and conclusions of law of Defendants.

Aug. 8, 1978--Response of Defendants to Plaintiffs' proposed findings of fact and conclusions of law.

Aug. 10, 1978--Response of Plaintiffs to Defendants' proposed findings of fact and conclusions of law.

Jan. 15, 1979--Motion of Plaintiffs for interim relief.

Jan. 15, 1979--Motion of Plaintiff City of Rome in parens patriae for interim relief.

Jan. 29, 1979--Response of Defendants to Plaintiffs' motion for interim relief.

Feb. 5, 1979--Reply by Plaintiffs to Defendants' response.

Apr. 6, 1979--Order and opinion filed Apr. 4, 1979 granting Plaintiffs' motion for summary judgment on the transfer of voter registration to Floyd County; granting Defendants' motion for summary judgment on Counts I, II, III, and IV of Plaintiffs' amended complaint; granting Defendants' motion for summary judgment on Count VI of Plaintiffs' amended complaint, without prejudice; dismissing case without prejudice.

May 2, 1979--Notice of appeal by Plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITY OF ROME, BRUCE HAMLER & H. F. HUNTER, Jr.	:	
Plaintiffs	:	
v.	:	CIVIL ACTION
THE UNITED STATES OF AMERICA, GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES and DREW S. DAY III, ASSISTANT ATTORNEY GENERAL OF THE UNITED STATES,	:	NO. 77-0797
Defendants.	:	

PLAINTIFFS' FIRST AMENDED COMPLAINT
FOR DECLARATORY JUDGMENT
FILED NOVEMBER 10, 1977

Come now the Plaintiffs, City of Rome, Bruce Hamler, in his official and his individual capacity, and H. F. Hunter, Jr., in his official and individual capacity, and, pursuant to the order of this Honorable Court of October 31, 1977, file this their First Amended Complaint and respectfully show the Court as follows:

ALLEGATIONS WITH RESPECT TO PARTIES AND JURISDICTION

1.

City of Rome, one of the Plaintiffs herein, is a municipal corporation and political subdivision of the State of Georgia, established by act of the Georgia General Assembly. City of Rome is not, however, a political subdivision within the meaning of the Voting Rights Act of 1965, (hereinafter referred to as the "Voting Rights Act"). City of Rome brings this action as a political subdivision of the State of Georgia and on behalf of its citizens in parens patriae.

2.

Plaintiff Bruce Hamler is City Manager of the City of Rome and resides in the City of Rome, where he is a duly registered voter. He brings this action both as City manager and as an individual citizen of Rome.

3.

Plaintiff H. F. Hunter, Jr. is Chairman of the Rome City Commission and resides in the City of Rome, where he is a duly registered voter. He brings this action both as Chairman of the Rome City Commission and as an individual citizen of Rome.

4.

Defendant Griffin B. Bell (succeeding Edward Levi) is Attorney General of the United States, (hereinafter referred to as the "Attorney General"), who is charged with certain responsibilities pursuant to Section 5 of the Voting

Rights Act of 1965, as amended, 42 USC 1973c, (hereinafter sometimes referred to as "Section 5").

5.

Defendant Drew S. Days, III (succeeding J. Stanley Pottinger) is Assistant Attorney General of the United States, Civil Rights Division, (hereinafter referred to as the "Assistant Attorney General"), to whom Defendant Bell has delegated his aforesaid responsibilities pursuant to Section 5 by way of regulations promulgated at 28 C.F.R. Sections 0.50 and 28 C.F.R. Part 51.

6.

This is an action for declaratory judgment pursuant to 28 USCA Section 2201 for the purposes of determining a question of actual controversy between the parties as hereinafter more fully appearing.

7.

This action arises under Article 4, Section 4 of the United States Constitution; under the First, Fifth, Ninth, Tenth and the Fifteenth Amendments to the United States Constitution; and under the Voting Rights Act of 1965, 42 USC Section 1973 et seq. Jurisdiction is based upon Sections 4, 5 and 14 of the Voting Rights Act, 42 USC Sections 1973b, 1973c and 1973L (b), and upon 28 USC Sections 1331, 1343(4), 1346 (a)(2).

8.

This action is one properly determinable by a district court of three judges, in accordance with Section 5 of the Voting Rights Act.

OPERATIVE FACTS

9.

Plaintiff City of Rome does not conduct registration for voting in elections for membership in the Rome City Commission or on the Rome Board of Education or registration for voting in any other primary or election, municipal or otherwise.

10.

Plaintiff City of Rome does not supervise registration for voting in elections for membership on the Rome City Commission or on the Rome Board of Education or registration for voting in any other primary or election, municipal or otherwise.

11.

No "test or device" as defined in Section 4 of the Voting Rights Act has been used within the City of Rome for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or otherwise, for at least seventeen years prior to the filing of this action.

12.

There is no history nor present existence of bloc-voting by race within the City of Rome.

13.

In 1968, the General Assembly of the State of Georgia passed an act known as the Georgia Municipal Election Code (Title 34A of the Code of Georgia of 1933). The said Election Code did, and does, apply to the City of Rome and took, and takes, precedence over the provisions of the Charter of the City of Rome.

14.

The Georgia Municipal Election Code was submitted to the United States Attorney General on May 13, 1968, and no objection thereto was interposed by him to Sections 34A-102 or 34A-1407(a) thereof.

15.

The said Election Code provides in Section 34A-102 thereof:

> "This Code shall apply to any general or special election in every municipal corporation of this State to fill any municipal office, and to any general or special municipal primary, if any, to nominate candidates for any such office, to any election to submit a question to the people, and to any other municipal election or primary for any other purpose whatsoever. Except as specifically provided in this Code, its provision shall take precedence over municipal charter provisions which are in conflict herewith."

16.

The said Election Code also provides, in Section 34A-1407(a) thereof:

> "If the municipal charter or ordinance, as now existing or as amended subsequent to the effective date of this Subsection, provides that a candidate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office."

17.

As of the effective date of the said Election Code, and subsection 34A-1407(a) thereof, the Charter of the City of Rome did not provide "that a candidate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office."

18.

In 1918, the General Assembly of the State of Georgia passed an Act creating a new charter and municipal government for the City of Rome. (Georgia Laws 1918, pp. 813-885). The Act established as the governing and legislative body a commission of seven members, one from each ward of the City and elected by the consolidated vote of the entire city.

19.

By the same Act (Georgia Laws 1918, pp. 813-885), there was established a board of education, consisting of five (5) members from the City and elected at large.

20.

In 1929, two additional wards (the eighth and the ninth) were annexed into the City, and an election for an additional commissioner to represent each of said wards was provided for. In the initial election, each such commissioner was to be elected only by residents of each such ward respectively, and thereafter in the manner provided for existing commissioners, to-wit, at large.

21.

The General Assembly passed certain Acts in 1966, 1967, 1970 and 1971 which were concerned with the composition of the government of the City of Rome, with the Board of Education of said City and with certain local election procedures. All the acts were enacted at a time when the provisions of Section 5 were in effect.

22.

Georgia Laws 1966, pp. 2375-8 amended the Charter of the City of Rome (Ga. Laws 1918, p. 813) to provide for the offices of city commissioners as follows: One Commissioner from one of three posts in each of three wards, to be elected by a majority vote.

23.

Georgia Laws 1966, pp. 2379-82 amended the Charter of the City of Rome (Ga. Laws 1918, pp. 813-885, as amended by Ga. Laws 1929, pp. 1254-1276) to provide for the reduction in the number of wards from Nine (9) to three (3). The three wards consisted of three areas of practicably equal population divided and formed by the confluence of three rivers in the City.

24.

Georgia Laws 1966, pp. 2382-2386 amended the Charter of the City of Rome, (Ga. Laws 1918, pp. 813-885) to provide for the qualifications and salary of commissioners, for organization of the commission and for election by posts in each of three wards.

25.

Georgia Laws 1966, pp. 3069-3072 amended the Charter of the City of Rome (Ga. Laws 1918, pp. 813-885) to remove certain restrictions from voter qualifications.

26.

Georgia Laws 1966, pp. 2815-2819 amended the charter of the City of Rome (Ga. Laws 1918, pp. 813-885) to provide for a six-member city board of education and for the election of members to said board by posts with two posts for each of three wards, to be elected by a majority vote.

27.

Georgia Laws 1966, pp. 3083-3087 amended the Charter of the City of Rome (Ga. Laws 1918, pp. 813-885) to make provisions for the nomination of candidates in city elections and for the conduct of primaries and elections.

28.

Georgia Laws 1967, pp. 3296-3298, corrected a typographical error in Georgia Laws 1966, pp. 2375-2378.

29.

Georgia Laws 1970, pp. 2563-2566 amended the Charter of the City of Rome (Ga. Laws 1918, pp. 813-885, as amended by Ga. Laws 1966, p. 2375) to change the election date of city commissioner elections and to provide for conduct of run-off elections.

30.

Georgia Laws 1971, pp. 3664-3666 amended the Charter of the City of Rome (Ga. Laws 1966, p. 2815) to change the election date of City Board of Education members and to provide for conduct of run-off elections.

31.

Said electoral changes were effected for the purpose of complying with the one-man, one-vote decisions of the United States Supreme Court; to conform Board of Education eligibility with City Commission eligibility; to follow the State of Georgia in requiring a majority vote for election to public office; and in order to assure

a measure of governmental experience in membership through staggered terms of members of the City boards.

32.

The aforesaid changes did not have as their purpose the denial or abridgement of the right to vote on account of race, color or otherwise.

33.

The aforesaid changes did not, and will not, have the effect of denying or abridging the right to vote on account of race, color or otherwise.

34.

In addition to the foregoing, after November 1, 1964 some sixty (60) annexations to the City of Rome were effected either by local state law or local ordinance. Said annexations took place in the course of, and in consequence of, the normal growth and expansion of the City of Rome.

35.

Said annexations did not have as their purpose the denial or abridgement of the right to vote on account of race, color or otherwise.

36.

Said annexations did not, and will not, have the effect of denying or abridging the right to vote on account of race, color or otherwise.

37.

The electoral changes and annexations did not cause, and will not lead to, a retrogression of racial minorities with respect to their effective exercise of the electoral franchise.

38.

On June 15, 1974, plaintiff City of Rome, by its chief legal officer and pursuant to Section 5, submitted to the Attorney General application for the approval of a 1973 annexation to the City of Rome of that area known as "the Old Airport Community", such area being an unincorporated portion of Floyd County, Georgia, which portion was completely surrounded by the City of Rome.

39.

By letters dated July 24, 1974, the Assistant Attorney General requested certain additional information with respect to the submission by Plaintiff City of Rome on June 15, 1974.

40.

On February 7, 1975, Plaintiff City of Rome, by its chief legal officer and pursuant to Section 5, provided additional information requested by the Assistant Attorney General on July 24, 1974, and supplemented said requested information on June 2, 1975.

41.

On February 10, 1975, Plaintiff City of Rome, by its chief legal officer and pursuant to Section 5, submitted to the Attorney General

application for the approval of annexations consisting of fifty-nine (59) areas, including certain industrial areas.

42.

The Attorney General interposed no objection to Georgia Laws 1966, pp. 2379-82, amending the Charter of the City of Rome to provide for the reduction in the number of wards from nine (9) to three (3).

43.

By letter dated August 1, 1975, the Assistant Attorney General interposed an objection, pursuant to Section 5, to the annexations submitted by Plaintiff City of Rome, June 15, 1974 and February 10, 1975.

44.

On August 21, 1975, Plaintiff City of Rome by its chief legal officer and pursuant to Section 5, submitted to the Attorney General application with respect to certain electoral changes made since the effective date of Voting Rights Act and sought reconsideration of the Attorney General's objection to earlier submissions.

45.

By letter dated October 20, 1975, the Assistant Attorney General interposed an objection, pursuant to Section 5, to the electoral changes submitted by Plaintiff City of Rome on August 21, 1975.

46.

By letter dated October 20, 1975, referred to above, the Attorney General withdrew his objection to forty-seven (47) of the sixty (60) annexations submitted by Plaintiff City of Rome on June 15, 1974 and February 10, 1975.

47.

On May 24, 1976, Plaintiff City of Rome, by its chief legal officer, sought reconsideration of the Attorney General's objection to thirteen (13) of the annexations submitted on June 15, 1974 and February 10, 1975 and to the electoral changes submitted on August 21, 1975.

48.

By letter dated August 12, 1976, the Assistant Attorney General withdrew his objection to the thirteen (13) annexations as they relate to the Rome Board of Education elections, but refused to withdraw the objection of the Attorney General to those thirteen (13) annexations as they relate to the Rome City Commission elections and also refused to withdraw the objection of the Attorney General to the electoral changes submitted on August 21, 1975.

49.

As a result of the aforesaid interpositions of objections by the Attorney General to the annexations and electoral changes submitted by Plaintiff City of Rome, the regularly scheduled elections for members of the Rome City Commission and the Rome Board of Education, as required by the laws of the State of Georgia, Georgia Laws 1918, pages 813-885, as amended,

(Charter of the City of Rome, Georgia, Sections 4, 5, 144 and 145), have not been conducted.

50.

Representatives of the United States Department of Justice have indicated to the chief legal officer of Plaintiff City of Rome that any attempt to conduct such regularly scheduled elections would be enjoined by the United States Department of Justice because of the aforesaid interpositions of objections by Defendants.

51.

As a result of the aforesaid interpositions of objections by Defendants, the democratic electoral process within the City of Rome, Georgia has been clouded, impaired and halted, and all citizens of said city have been denied their right to associate and participate in the election of their public officials.

COUNT 1

THE CITY OF ROME, GEORGIA IS NOT A POLITICAL SUBDIVISION SUBJECT TO THE VOTING RIGHTS ACT

52.

Plaintiffs hereby incorporate the allegations of paragraphs 1 through 12 of this First Amended Complaint into, and make said allegations by reference a part of, this Count I.

53.

Plaintiff City of Rome is not a "political subdivision" within the meaning of the Voting Rights Act.

54.

Plaintiff City of Rome was and is not required to make submissions as required of political subdivisions by Section 5.

WHEREFORE, Plaintiffs pray that, pursuant to the provisions of 28 U.S.C. Section 2884, 42 U.S.C. Section 1973b(a) and 42 U.S.C. Section 1973c, a District Court of three judges be convened, and that said Court declare (a) that the City of Rome, Georgia, is not covered by, and subject to, the Voting Rights Act, and is not required to seek preclearance under Section 5 thereof; and (b) that Plaintiff City of Rome may enforce its electoral changes and annexations.

COUNT II

PLAINTIFF CITY OF ROME, IF IT WAS SUBJECT TO THE VOTING RIGHTS ACT, HAS NOT USED DURING THE SEVENTEEN YEARS PRECEDING THE FILING OF THIS ACTION ANY TEST OR DEVICE FOR THE PURPOSE OR WITH THE EFFECT OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR, OR OTHERWISE, AND THE CITY IS NO LONGER SUBJECT TO THE VOTING RIGHTS ACT.

55.

Plaintiffs hereby incorporate the allegations of paragraphs 1 through 12 of this First Amended Complaint into, and make said allegations by reference a part of, this Count II.

56.

If it is determined that Plaintiff City of Rome was a political subdivision subject to the Voting Right Act as of the time of its passage, then because of the facts hereinbefore set out in paragraph 11 hereof, Plaintiff City of Rome should be entitled to "bail out" of said coverage in accordance with the provisions of Section 4 of said Act, 42 U.S.C. 1973b.

WHEREFORE, Plaintiffs pray, that, pursuant to the provisions of 28 U.S.C Section 2884, 42 U.S.C. Section 1937b(a) and 42 U.S.C. Section 1973c, a District Court of three judges be convened, and that, if said Court should determine and declare that the City of Rome, Georgia is covered by the Voting Rights Act, it further determine and declare (a) that no test or device as defined in 42 U.S.C. 1973b has been used in the City of Rome during the seventeen years preceding the filing of this action for the purpose or with the effect of denying or abriding the right to vote on account of race or color or otherwise, and that the City of Rome is no longer subject to the Voting Rights Act; and (b) that Plaintiff City of Rome may enforce its electoral changes and annexations.

COUNT III

PLAINTIFF CITY OF ROME MAY ENFORCE ITS ELECTORAL CHANGES AND ANNEXATIONS BECAUSE (A) THE MAJORITY VOTE REQUIREMENT HAS ALREADY BEEN PRECLEARED AND (B) THE ATTORNEY GENERAL

FAILED TO OBJECT THERETO WITHIN SIXTY (60) DAYS IN ACCORDANCE WITH SECTION 5.

57.

Plaintiffs hereby incorporate the allegations of paragraphs 1 through 48 of this First Amended Complaint into, and make said allegations by reference a part of, this Count III.

58.

Because of the facts set out in paragraphs 13 through 17 hereof, Georgia Laws 1966, pp. 2375-8, (the majority vote requirement), has already been precleared by the Attorney General and requires no further action by Plaintiff City of Rome.

59.

The Attorney General is required by Section 5 to interpose his objections to any submission by a state or political subdivision within sixty (60) days after such submission.

60.

The Attorney General failed to respond to the submission by Plaintiff City of Rome on June 15, 1974, as supplemented by the information supplied by Plaintiff City of Rome on February 7, 1975, as hereinafter more fully appears.

61.

In a letter received by the Attorney General on May 24, 1976, Plaintiff City of Rome

requested reconsideration of the electoral changes submitted on August 21, 1975.

62.

The Attorney General failed to respond to such request for reconsideration until August 12, 1976 and thus failed to respond within the time required by Section 5.

WHEREFORE, Plaintiffs pray that, pursuant to the provisions of 28 U.S.C. Section 2884, 42 U.S.C. Section 1937b(a) and 42 U.S.C Section 1973c, a District Court of three judges be convened, and that, if said Court should determine and declare that the City of Rome, Georgia, is covered by the Voting Rights Act, it further determine (a) that Georgia Laws 1966, pp. 2375-8 the majority vote requirement, has already been precleared by the Attorney General and (b) that the Attorney General has not interposed an objection within sixty (60) days after the submission referred to in the Complaint, and (c) that Plaintiff City of Rome may enforce its electoral changes and annexations.

COUNT IV

SECTION 5 IS UNCONSTITUTIONAL

63.

Plaintiffs hereby incorporate the allegations of paragraphs 1 through 62 of this First Amended Complaint into, and make said allegations by reference a part of, this Count IV.

64.

Plaintiffs show that Section 5 is null and void in that the requirements thereof violate Article 4, Section 4 of the United States Constitution, guaranteeing a Republican Form of Government.

65.

Plaintiffs show that Section 5 is null and void in that the requirements thereof violate the Fifth Amendment to the United States Constitution, guaranteeing due process of law.

66.

Plaintiffs show that Section 5 is null and void in that the effect thereof violates the First and Ninth Amendments to the United States Constitution, guaranteeing the right of all citizens to participate in the political process of the municipality in which they reside.

67.

Plaintiffs show that Section 5 is null and void in that the requirements thereof violate the Tenth Amendment to the United States Constitution reserving the integral and traditional function of enacting laws and conducting local elections to the City of Rome, as a political unit of the State of Georgia.

68.

Plaintiffs show that Section 5 is null and void in that the requirements thereof violate the Fifteenth Amendment to the United States Constitution which require not only a showing of

disproportionate racially discriminatory effect but also a showing of racially discriminatory purpose as a sine qua non of a constitutional violation.

WHEREFORE, Plaintiffs pray that, pursuant to the provisions of 28 U.S.C. Section 2884, 42 U.S.C. Section 1937b(a) and 42 U.S.C. Section 1973c, a District Court of three judges be convened, and that said Court determine and declare:

(a) That Section 5 is null and void as contrary to the Constitution of the United States, either as a violation of:

(1) Article 4, Section 4, or
(2) The Fifth Amendment, or
(3) The First and Ninth Amendments, or
(4) The Tenth Amendment, or
(5) The Fifteenth Amendment, or
(6) All of said Provisions hereinbefore set out, or any combination thereof

and

(b) That Plaintiff City of Rome may enforce its electoral changes and annexations.

COUNT V

SECTION 5 HAS BEEN, AND IS BEING UNCONSTITUTIONALLY APPLIED TO PLAINTIFF CITY OF ROME.

69.

Plaintiffs hereby incorporate the allegations of paragraphs 1 through 68 of this First Amended Complaint into, and make said allegations by reference a part of, this Count V.

70.

The "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965," promulgated by the United States Attorney General pursuant to 5 U.S.C. 301, 28 U.S.C. 509 and 42 U.S.C. 1973c, governing the administration of Section 5, are null and void in that:

A. They violate Article 4, Section 4 of the United States Constitution, guaranteeing a Republican Form of Government;

B. They violate the Fifth Amendment of the United States Constitution, guaranteeing due process of law;

C. The effect thereof violates the First and Ninth Amendments to the United States Constitution, guaranteeing the right of all citizens to participate in the political process of the municipality in which they reside.

D. The requirements thereof violate the Tenth Amendment of the United States Constitution, reserving the integral and traditional function of enacting laws and conducting local elections to the City of Rome as a political unit of the State of Georgia.

E. The requirements thereof violate the Fifteenth Amendment of the United States Constitution, which require not only a showing of disproportionate racially discriminatory impact but also a showing of racially discriminatory purpose as a sine qua non of a constitutional violation.

71.

Defendants, in promulgating and following said regulations, and in their other actions with respect to Plaintiffs, have applied the provisions of Section 5 unconstitutionally.

72.

Section 5 requires that the interposition of objections by the Attorney General to any submission by a state or political subdivision thereof must be based upon a finding that the qualification, prerequisite, standard, practice or procedure has the purpose and will have the effect of denying or abridging the right to vote on account of race or color.

73.

Defendants have failed to conduct any hearing with respect to the purpose or the effect of the electoral changes and annexations submitted by Plaintiff City of Rome, and thereby denied to Plaintiffs due process of law.

74.

Defendants have failed to make any finding whatsoever with respect to any alleged present existence or history of bloc voting by race within the City of Rome, Georgia, a finding necessary to the objections interposed.

75.

Defendants have failed to make any finding whatsoever with respect to the purpose of the electoral changes and annexations submitted by Plaintiff City of Rome, a finding necessary to the objections interposed.

76.

By interposing objections to the electoral changes and annexations submitted by Plaintiff City of Rome, Defendants have acted beyond the scope of their authority as Attorney General and Assistant Attorney General

77.

The interpositions of objections by Defendants have denied to Plaintiff City of Rome and Plaintiff Hamler and Plaintiff Hunter the right to a Republican Form of Government as guaranteed by Article 4, Section 4 of the United States Constitution.

78.

The interpositions of objections by Defendants have denied Plaintiff City of Rome and Plaintiff Hamler and Plaintiff Hunter due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

79.

The interpositions of objections by Defendants have denied and disparaged the rights of Plaintiff Hamler and Plaintiff Hunter as well as the other citizens of Rome, Georgia, to participate in the political process of the municipality

in which they reside as guaranteed by the First and Ninth Amendments to the United States Constitution.

80.

The interpositions of objections by Defendants have denied to Plaintiff City of Rome the right to enact laws and conduct elections as guaranteed by the Tenth Amendment to the United States Constitution.

81.

The interpositions of objections by Defendants have violated the Fifteenth Amendment to the United States Constitution, because Defendants have not found in the actions of Plaintiff City of Rome any racially discriminatory purpose, which is a sine qua non of grounds for said objections.

WHEREFORE, Plaintiffs pray that, pursuant to the provisions of 28 U.S.C. Section 2884, 42 U.S.C. Section 1937b(a) and 42 U.S.C. Section 1973c, a District Court of three judges be convened, and that said Court determine and declare (a) that Section 5 has been unconstitutionally applied to Plaintiff City of Rome by the Attorney General and that his objections are invalid as a result of such unconstitutional application, and (b) that Plaintiff City of Rome may enforce its electoral changes and annexations.

COUNT VI

IF PLAINTIFF CITY OF ROME IS SUBJECT TO THE VOTING RIGHTS ACT, THE

ELECTORAL CHANGES AND ANNEXATIONS REFERRED TO HEREIN DID NOT HAVE THE PURPOSE AND WILL NOT HAVE THE EFFECT OF DENYING OR ABRIDGING THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR, OR OTHERWISE.

82.

Plaintiffs hereby incorporate the allegations of paragraphs 1 through 37 of this First Amended Complaint into and make said allegations by reference a part of, this Count VI.

83.

The electoral changes and annexations did not have as their purpose causing or leading to a retrogression of racial minorities with respect to their effective exercise of the electoral franchise.

84.

The electoral changes and annexations do not cause, and will not lead to, a retrogression of racial minorities with respect to their effective exercise of the electoral franchise.

WHEREFORE, Plaintiffs pray that, pursuant to the provisions of 28 U.S.C. Section 2884, 42 U.S.C. Section 1937b(a) and 42 U.S.C Section 1973c, a District Court of three judges be convened, and that, if said Court should determine and declare that the City of Rome, Georgia, is covered by the Voting Rights Act of 1965, it further determine and declare (a) that the electoral changes and annexations, referred to in the Complaint, did not have the purpose and will not have the effect of denying

or abridging the right to vote on account of race or color, or otherwise, and (b) that Plaintiff City of Rome may enforce its electoral changes and annexations.

COUNT VII

ATTORNEYS FEES

85.

Plaintiffs hereby incorporate the allegations of paragraphs 1 through 84 of this First Amended Complaint into, and make said allegations by reference a part of, this Count VII.

86.

If Plaintiffs prevail on the Counts hereinbefore set out, or any of them, they are entitled to reasonable attorneys fees for the prosecution of this action.

WHEREFORE, Plaintiffs pray that, pursuant to the provisions of 28 U.S.C. Section 2884, 42 U.S.C. Section 1937b(a) and 42 U.S.C. Section 1973c, a District Court of three judges be convened, and that if Plaintiffs prevail in this action, they be awarded attorneys fees in a reasonable sum.

(Signatures and Certificate of Service Omitted in Printing)

* * * * * * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Title Omitted in Printing)

ANSWER

FILED NOVEMBER 21, 1977

For their answer to the amended complaint filed herein, defendants state:

1. Defendants admit the allegation contained in paragraph 1 of the complaint. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation contained in the second sentence of paragraph 1. In response to the third sentence of paragraph 1, defendants admit that the City of Rome brings this action as a political subdivision of the State of Georgia.

2. Defendants admit the allegations contained in paragraphs 2 and 3 of the complaint.

3. Defendants admit the allegations contained in paragraphs 4 and 5 of the complaint.

4. In answer to paragraph 6 of the complaint, defendants admit that to the extent that this action is authorized under 42 U.S.C. 1973c and 42 U.S.C. 1973L(b), a controversy exists between the City of Rome and the defendants.

5. Defendants admit that this court has jurisdiction under Section 5 and 14(b) of the Voting Rights Act, 42 U.S.C. 1973c, 1973L(b), to hear the plaintiffs' request for a declaratory judgment as to whether the voting changes at issue are subject to the preclearance requirement of Section 5 and whether those voting changes are nondiscriminatory in purpose and

effect. Defendants deny the remaining allegations contained in paragraph 7.

6. Defendants admit the allegations contained in paragraph 8.

7. Defendants admit the allegations contained in paragraph 9 of the complaint. By way of further answer, defendants aver that the City of Rome does not now conduct registration for voting in municipal elections. However, the City of Rome conducted registration for voting from 1964 until 1969, at which time Floyd County assumed the responsibility for registering voters. Defendants also aver that the transfer of registration responsibility from the City of Rome to Floyd County, Georgia in 1969 has not received preclearance under Section 5 of the Voting Rights Act.

8. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 10 of the complaint.

9. Defendants deny the allegations contained in paragraph 11 of the complaint.

10. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12 of the complaint.

11. Defendants admit the allegation contained in the first sentence of paragraph 13. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation contained in the second sentence in paragraph 13 of the complaint.

12. Defendants admit the allegations contained in paragraphs 14, 15 and 16 of the complaint.

13. Defendants deny the allegations of paragraph 17. Defendants aver that at the time the Voting Rights Act became effective, the Rome Charter provided that candidates may be nominated or elected by a plurality of the votes. A 1966 amendment which attempted to impose a majority vote requirement is legally unenforceable since it has not satisfied the preclearance requirements of Section 5. (See complaint, paragraph 22). Thus as of the effective date of the 1968 Georgia Municipal Election Code the plurality win requirement, rather than majority vote, was the legally enforceable method of election in the City of Rome.

14. Defendants admit the allegations contained in paragraph 18 of the complaint. By way of further answer to paragraph 18, defendants aver that by operation of Georgia Laws, 1918, pp. 813-885, the city commissioners were elected concurrently by plurality and without numbered posts.

15. Defendants admit the allegations contained in paragraph 19. By way of further answer to paragraph 19, defendants aver that by operation of Georgia Laws 1918, pp. 813-885, the board of education members were elected concurrently and without numbered posts.

16. Defendants admit the allegations contained in paragraph 20. By way of further answer to the second sentence of paragraph 20, defendants aver that the two additional commissioners would thereafter also be subject to the

other electoral requirements that were then in existence in Rome namely, plurality-win elections at which the officials were elected on a concurrent basis and without numbered posts.

17. Defendants admit the allegations contained in paragraph 21 of the complaint.

18. Defendants admit the allegations contained in paragraph 22 of the complaint. By way of further answer to paragraph 22, defendants aver that in addition to a numbered post and majority-vote requirement, Georgia Laws 1966, pp. 2375-8 also established a time framework for run-off elections when the majority-vote feature had not been satisfied. Defendants also aver that Georgia Laws 1966, pp. 2375-8 imposed a staggered term provision for city commissioner elections.

19. Defendants admit the allegations contained in the first sentence of paragraph 23 of the complaint. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in the second sentence of paragraph 23 of the complaint.

20. Defendants admit the allegations contained in paragraph 24 of the complaint. By way of further answer to paragraph 24 of the complaint, defendants aver that in addition to a numbered post provision, Georgia Laws 1966, pp. 2382-2386 also contained a majority vote requirement.

21. Defendants admit the allegations contained in paragraph 25 of the complaint.

22. Defendants admit the allegations contained in paragraph 26 of the complaint. By

way of further answer to paragraph 26, defendants aver that in addition to increasing the size of the Board of Education to six members, and providing for a numbered post provision and majority vote requirement, Georgia Laws 1966, pp. 2815-2819 established a framework for run-off elections when the majority vote feature had not been satisfied, and imposed a staggered-term provision and a sub-district residency requirement for Board of Education elections.

23. Defendants admit the allegations contained in paragraphs 27, 28, 29 and 30 of the complaint.

24. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 31 and 32 of the complaint.

25. Defendants deny the allegation contained in paragraph 33 of the complaint. Defendants aver that the aforementioned legislation provided for the establishment of, and then the continuation of, majority vote, numbered posts, and staggered terms for commissioner and for board of education elections and the imposition of a residency requirement for board of education elections. Defendants aver that these requirements have the effect of denying or abridging the right to vote on account of race or color in the context of the at-large system in effect in the City of Rome.

26. In answer to the allegations of paragraph 34 of the complaint, defendants admit that since November 1, 1964, at least sixty annexations to the City of Rome have been made. Defendants lack knowledge or information

sufficient to form a belief as to whether additional annexations were also made during this time period. Defendants lack knowledge as to whether "the annexations took place in the course of, and in consequence of, the normal growth and expansion of the City of Rome."

27. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 35 of the complaint.

28. Defendants deny the allegations contained in paragraph 36 of the complaint insofar as they pertain to those annexations which have previously been described by the City of Rome in the following fashion:

Saddle Mountain - Du Pre
Holmes Acres - East 11th Extension
Lyons Drive - West Rome - Ala. Road
Georgia & Old Salem Apartments
Battey Hospital
Maplewood Square
Garden Lakes Rollingwood Area
Berkshire Estates
W. A. Du Pre - Rockmart Road
Westminister Apts, Harry Butler
Castle Cove Subdivision Area
Saddle Mt. #4, Bill Du Pre
Old Airport Community

Defendants admit the allegations contained in paragraph 36 of the complaint insofar as they pertain to those annexations which have previously been described by the City of Rome in the following fashion:

G.E. Plant & Site
Brookwood Estate - Burnett Ferry Rd.

Maplewood - Jack Anderson
East 17th Street - Maurice Gann
Off Saddle Mountain - Jack Busbin
3 Lost Lenox Circle - Traylor
East 11th St. - Rogers & Culbreth
Briarcliff Road - Mt. View Annex
One lot
Catholic School & Home
One lot - Bob Cescutti
Commercial (Commercial Park)
Darlington Sch. Strip Land,
Furnance Rd.
Commercial - Keller Dye Co.
Waste Treatment Plant (City)
North Heights Elem. School (City)
Beakert Steel Co.
G. L. Sutton, Black's Bluff Road
1 Lot Atteiram Subdivision
Commercial - Coosa Baking Co.
Commercial - Intergrated Products
Commercial - Southern Wholesale
Westwood Sub. Clyde Chester
Fox. Mfg. Co. Commercial, Old
Lindale Rd.
Berry Schools Comm., John Maddox
Dr.
Hosp. Corp. of America, Redmond
Park Hospital
Fellowship Baptist Church
Road Strip (Burnett Ferry Road)
Strip Road Old Lindale Road
Ramada Inn - Chas. Williams & Smith
Williamsom Street -Chas. Williams
End East 11th St. -Billy Towers
Saddle Mt. #3, Howell & Covington
Oostandaula River Pumping Station
(City)
V. E. Anderson, Gateway
Waste Treatment Plant (City)
Turner Frozen Foods, Rockmart Road

Commercial Garden Lakes Inds. Blvd.
Red Diamond - Alabama Road
Commercial, East Gate, Dodd Blvd.
East Gate #2, Hwy. 411, Howell & Covington
Maplewood Park - Munchak
Hwy. 411 Woodfin Turner Property
Hidden Valley, Howell & Covington
Commercial Coca Cola Co. Barron Corp.
Commercial Pharr Yarns, Huffacre Road
National City Bank, Martha Berry Blvd.

Defendants aver that the forty-seven annexations mentioned immediately above have been precleared pursuant to Section 5 by the Attorney General.

By way of further answer, defendants aver that they lack knowledge of information sufficient to form a belief as to the truth of the allegations contained in paragraph 36 insofar as they pertain to any annexations other than those identified in this answer.

29. Defendants deny the allegations contained in paragraph 37 of the complaint insofar as they pertain to Georgia Laws 1966, pp. 2375-2378; Georgia Laws 1966, pp. 2379-2382; Georgia Laws 1966, pp. 2382-2386; Georgia Laws 1966, pp. 3069-3072; Georgia Laws 1966, pp. 2815-2819; Georgia Laws 1966, pp. 3083-3087; Georgia Laws 1967, pp. 3296-3298; Georgia Laws 1970, pp. 2563-2566; Georgia Laws 1971, pp. 3664-3666, which established in the context of an already existing at-large system, a majority vote, numbered post and staggered term provision in commissioner and board of education

elections and a sub-district residency requirement for board of education elections. Defendants also deny the allegations contained in paragraph 37 insofar as they pertain to the thirteen annexations described in the first sentence of defendants' answer to paragraph 36 of the complaint. Defendants admit the truth of the allegations contained in paragraph 37 of the complaint insofar as they pertain to the forty-seven annexations described in the second sentence of defendants' answer to paragraph 36 of the complaint.

30. Defendants admit the allegations contained in paragraphs 38 and 39 of the complaint.

31. In answer to the allegations of paragraph 40 of the complaint, defendants admit that on February 7, 1975, the City of Rome forwarded to the Attorney General some of the additional information which had previously been requested, which the Attorney General received on February 10, 1975. The city did not forward all of the information which had been requested and, by letter dated March 6, 1975, the office of the Attorney General requested that the missing information be submitted. The Attorney General received the remainder of the information on June 2, 1975.

32. Defendants admit the allegations contained in paragraph 41 of the complaint. By way of further answer, defendants aver that on March 6, 1975, certain additional information pertaining to this submission was requested and that this information was received by the Department on June 2, 1975.

33. Defendants admit the allegations contained in paragraph 42 of the complaint.

34. Defendants admit the allegations contained in paragraph 43 of the complaint. Defendants aver that the June 15, 1974 submission and the February 10, 1975 submission were not completed until June 2, 1975, and that the Section 5 objection of August 1, 1975 concerned all of the submitted annexations.

35. Defendants admit the allegations of paragraphs 44 and 45 of the complaint.

36. Defendants admit the allegations contained in paragraph 46 of the complaint. Defendants aver that the Attorney General withdrew the Section 5 objection to 47 of the 60 annexations which collectively had been submitted on June 15, 1974 and February 10, 1975, and which submissions were completed on June 2, 1975.

37. Defendants admit the allegations of paragraph 47 of the complaint. Defendants aver that one of the thirteen annexations referred to was first submitted on June 15, 1974, the remaining twelve in question were submitted on February 10, 1975 and that both submissions were completed on June 2, 1975. By way of further answer, defendants aver that on July 14, 1976, the City of Rome supplemented its request for reconsideration by providing the Attorney General with affidavits from two members of the black community in Rome.

38. Defendants admit the allegations contained in paragraph 48 of the complaint.

39. In answer to the allegations of paragraph 49, defendants admit that since the date that the abovementioned objections were interposed, the City of Rome has not conducted its regularly scheduled elections as set forth by its charter. Defendants deny the remaining allegations of paragraph 49.

40. Defendants deny the allegations contained in paragraph 50 of the complaint. By way of further answer, defendants aver that a representative of the Department of Justice informed the chief legal officer of the City that injunctive relief might be sought should the city seek to enforce those voting changes that had not met the preclearance requirements of Section 5.

41. Defendants deny the allegations contained in paragraph 51 of the complaint.

42. In answer to paragraph 52 of the complaint, defendants hereby incorporate the responses given in paragraphs 1-10 of this answer.

43. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 53 of the complaint.

44. Defendants deny the allegation of paragraph 54 of the complaint.

45. In answer to paragraph 55 of the complaint, defendants hereby incorporate the responses given in paragraphs 1-10 of this answer.

46. Defendants deny the allegations contained in paragraph 56 of the complaint, whcih allege that the City of Rome is entitled to "bailout" from coverage under the Act.

47. In answer to the allegations contained in paragraph 57 of the complaint, defendants hereby incorporate the responses given in paragraphs 1-38 of this answer.

48. Defendants deny the allegations contained in paragraph 59 of the complaint.

49. Defendants admit the allegations contained in paragraph 59 of the complaint. Defendants aver that the Attorney General is required to interpose an objection to any submission within 60 days after such submission is completed.

50. Defendants deny the allegations contained in paragraph 60 of the complaint. By way of further answer, defendants aver that the Attorney General responded to the June 15, 1974 submission on July 24, 1974, when he requested additional information regarding the submission. The Attorney General responded to the February 10, 1975 submission on March 6, 1975, when he requested additional information regarding the submission.

51. Defendants admit the allegations contained in paragraph 61 of the complaint. By way of further answer, defendants aver that on July 14, 1976, the City of Rome supplemented this request by providing the Attorney General with affidavits from two members of the black community in Rome.

52. Defendants deny the allegations contained in paragraph 62 of the complaint. By way of further answer, defendants aver that the Attorney General responded to the request for reconsideration within sixty days from the date that the City of Rome supplemented the request by providing affidavits on July 14, 1976. Defendants also aver that although the Attorney General attempts to respond to requests for reconsideration with sixty days (28 C.F.R. Section 51.21), each objection remains effective until withdrawn and is not automatically withdrawn at the conclusion of a sixty day period.

53. In answer to the allegations contained in paragraph 63 of the complaint, defendants hereby incorporate the responses given in paragraphs 1-52 of this answer.

53. In answer to the allegations contained in paragraph 63 of the complaint, defendants hereby incorporate the responses given in paragraphs 1-52 of this answer.

54. Defendants deny the allegations contained in paragraphs 64-68 of the complaint.

55. In answer to the allegations contained in paragraph 69 of the complaint (Count V), defendants hereby incorporate the responses given in paragraphs 1-54 of this answer.

56. Defendants deny the allegations contained in paragraph 70 of the complaint.

57. Defendants have moved to dismiss paragraphs 71-81 of the complaint and thus defendants are not answering the allegations contained in those portions of the complaint at this time.

58. In answer to paragraph 82 of the complaint, defendants hereby incorporate the responses given in paragraphs 1-29 of this answer.

59. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 83 of the complaint.

60. Defendants deny the allegation contained in paragraph 84 of the complaint.

(Signatures and Certificate of Service omitted in printing)

* * * * * * * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Title Omitted in Printing)

PLAINTIFF'S FIRST REQUEST FOR
ADMISSION OF FACTS AND
GENUINENESS OF DOCUMENTS

December 7, 1977

Exhibit "A"

DEPARTMENT OF JUSTICE
WASHINGTON

July 11, 1968

AIR MAIL
Honorable Arthur K. Bolton
Attorney General
State of Georgia
132 Judicial Building
Forty Capitol Square
Atlanta, Georgia 30334

Dear Mr. Attorney General:

This will reply to your letter of May 13, 1968, in which you submitted to the Attorney General, pursuant to Section 5 of the Voting Rights Act of 1965, the Georgia Municipal Election Code and Act No. 993, adopted by the Georgia General Assembly during the 1968 session. We have reviewed the submitted Code and Act and, on behalf of the Attorney General of the United States, make the following objections, pursuant to Section 5 of the Voting Rights Act of 1965.

1. Section 34A-1211 of the Georgia Municipal Election Code, provides for assistance to voters in a manner identical to that provided by Section 13 of Act No. 997 which you previously submitted to this Department. I sent you my response to this submission on June 19, 1968. The objection to the present submission of Section 34A-1211 is the same as I made in that letter. I indicated that the Court in Morris v. Fortson, 261 F. Supp. 538 (N.D. Ga. 1966), held that the new statute limiting to one the number of illiterate electors who could be assisted by another elector is unreasonable. The Court found the old statute which permitted an

elector to assist ten individual voters was reasonable. We see no valid basis for restricting the number below ten, particularly in light of the fact that one of the effects of the Voting Rights Act is to increase the number of illiterate voters in your state. We received today your letter of June 28, 1968 and will give it careful consideration.

2. The Attorney General must also object under Section 5 of the Voting Rights Act of 1965 to Section 34A-501(b), Section 34A-505, and Section 34A-512 of the Georgia Municipal Elections Code. This objection applies only to those municipalities which did not have in force or effect on November 1, 1964, standards, practices or procedures identical to those set out in the new Georgia Municipal Code.

   I would appreciate it if you would furnish me the names of the municipalities which did not have such standards, practices and procedures in effect on November 1, 1964.

   I should also advise you that these sections were suspended by Section 4 of the Voting Rights Act of 1965. I am aware that in your submission section 34A-512 has stamped in the margin a notation that it was suspended by that Act.

3. Section 34A-403 and Section 34A-503 of the Georgia Municipal Election Code require persons who hold the election

and registration offices enumerated be "judicious, intelligent and upright electors." These qualifications are vague and subjective, and are subject to the same kind of discriminatory application tnat formed the basis for invalidating tests and devices under the Voting Rights Act of 1965. Also, your submission does not include information as to whether these standards enumerated in the Code were the same as those in force or effect by the various municipalities in the state on November 1, 1964. In light of these two factors, we have an obligation to interpose an objection to these sections in those municipalities in which these standards were not in force or effect on November 1, 1964. However, we would be pleased to review this determination in the event we receive from you information relating to the standards in force in each municipality on November 1, 1964 and an analysis by race of the poll officers, registrar and deputy registrar, in each municipality since August 6, 1965.

With reference to those sections of the Georgia Municipal Election Code to which objections have not been interposed, I am sure that you are aware that my failure to object does not bar any subsequent action to enjoin the enforcement of any of these sections.

Please do not hesitate to contact my office if you have any questions in regard to the above matters. Should you wish to bring additional facts to the attention of the Attorney

General, he would be pleased to entertain them and reappraise his position.

Sincerely,

/S/

STEPHEN J. POLLAK
Assistant Attorney General
Civil Rights Division

* * * * * * * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Title Omitted in Printing)

PARTIES' FIRST STIPULATION OF FACTS
Filed December 14, 1977

Come now Plaintiffs and Defendants in the above-captioned matter, and pursuant to the Order of this Honorable Court, file this their First Stipulation of Facts, agreeing that the following facts are true:

1.

The City of Rome is the larger of two incorporated cities in Floyd County, Georgia. According to the 1970 U.S. Census of Population, the population of Floyd County, Georgia is:

A. Total population: 73,742
   1. Total white population: 64,137 (87.0%)
   2. Total black population: 9,605 (13.0%)

B. Floyd County less the City of Rome total population: 42,983
   1. Total white population: 40,594 (94.4%)
   2. Total black population: 2,389 (5.6%)

2.

According to the 1970 U.S. Census of Population, the City of Rome, Georgia has:

A. Total population: 30,759
   1. Total white population: 23,543 (76.6%)
   2. Total black population: 7,216 (23.4%)

B. Total Population, by Wards:
   1. Ward 1 total population: 7,514
      a. Total white population: 5,359 (71.3%)
      b. Total black population: 2,155 (28.7%)
   2. Ward 2 total population: 11,523
      a. Total white population: 7,619 (66.2%)
      b. Total black population: 3,894 (33.8%)
   3. Ward 3 total population: 11,722
      a. Total white population: 10,555 (90.0%)
      b. Total black population: 1,167 (10.0%)

C. Total Voting Age Population: 20,974
   1. Total white voting age population: 16,639 (79.4%)
   2. Total black voting age population: 4,335 (20.6%)

3.

According to the Voter Registrar of Floyd County, as of 1975, there were within the corporate limits of the City of Rome:

A. Total registered voters: 13,097
   1. Total white registered voters: 10,982 (83.9%)
   2. Total black registered voters: 2,026 (15.5%)

4.

The City of Rome is governed by a council-manager form of government. The city council (known as the Rome City Commission) has, for at least 59 years, been elected at large. The City Manager is a full-time employee, appointed by, and serving at the will of, the council.

5.

The City of Rome does not conduct registration for voting in elections for membership on the Rome City Commission or on the Rome Board of Education or registration for voting in any other primary or election, municipal or otherwise. However, the City of Rome conducted registration for voting from 1964 until 1969, at which time Floyd County assumed the responsibility for registering voters. (See Paragraphs 43 and 44 herein). The transfer of registration responsibility from the City of Rome to Floyd County, Georgia in 1969 has not received preclearance under Section 5 of the Voting Rights Act; however, in Plaintiffs' "Supplement to their First Amended Complaint", Plaintiffs seek preclearance thereof in this lawsuit.

6.

In 1968, the General Assembly of the State of Georgia passed an act known as the Georgia Municipal Election Code (Title 34A of the Code of Georgia of 1933).

7.

The Georgia Municipal Election Code was submitted to the United States Attorney General on May 13, 1968, and no objection thereto was interposed by him to Sections 34A-102 or 34A-1407(a) thereof.

8.

The said Election Code provides in Section 34A-102 thereof:

> "This Code shall apply to any general or special election in every municipal corporation of this State to fill any municipal office, and to any general or special municipal primary, if any, to nominate candidates for any such office, to any election to submit a question to the people, and to any other municipal election or primary for any other purpose whatsoever. Except as specifically provided in this Code, its provision shall take precedence over municipal charter provisions which are in conflict herewith."

9.

The said Election Code also provides, in Section 34A-1407(a) thereof:

"If the municipal charter or ordinance, as now existing or as amended subsequent to the effective date of this Subsection, provides that a candidate may be nominated or elected by a plurality of the votes cast to fill such nomination or public office, such provision shall prevail. Otherwise, no candidate shall be nominated for public office in any primary or elected to public office in any election unless such candidate shall have received a majority of the votes cast to fill such nomination or public office."

10.

In 1918, the General Assembly of the State of Georgia passed an act creating a new charter and municipal government for the City of Rome. (Georgia Laws 1918, pp. 813-885). Exhibit 1. The Act established as the governing and legislative body a commission of seven members, one from each ward of the City and elected by the consolidated vote of the entire city. By operation of said laws, the city commissioners were elected concurrently by plurality and without numbered posts.

11.

By the same Act (Georgia Laws 1918, pp. 813-885), there was established a board of education, consisting of five (5) members from the City and elected at large. By operation of said laws, the board of education members were elected concurrently and without numbered posts.

12.

In 1929, two additional wards (the eighth and the ninth) were annexed into the City, and an election for an additional commissioner to represent each of said wards was provided for. In the intial election, each such commissioner was to be elected only by residents of each such ward respectively, and thereafter in the manner provided for existing commissioners, to-wit, at large. The two additional commissioners would thereafter also be subject to the other electoral requirements that were then in existence in Rome namely, plurality-win elections at which the officials were elected on a concurrent basis and without numbered posts. Exhibit 2.

13.

The General Assembly passed certain Acts in 1966, 1967, 1970 and 1971 which were concerned with the composition of the government of the City of Rome, with the Board of Education of said City and with certain local election procedures. All the acts were enacted at a time when the provisions of Section 5 were in effect.

14.

Georgia Laws 1966, pp. 2375-8 amended the Charter of the City of Rome (Ga. Laws 1918, p. 813) to provide for the offices of city commissioners as follows: One Commissioner from one of three posts in each of three wards, to be elected by a majority vote. Said laws also established a time framework for run-off elections when the majority-vote feature had not

been satisfied. Said laws also imposed a staggered term provision for city commissioner elections. Exhibit 3.

15.

Georgia Laws 1966, pp. 2379-82 amended the Charter of the City of Rome (Ga. Laws 1918, pp. 813-885, as amended by Ga. Laws 1929, pp. 1254-1276) to provide for the reduction in the number of wards from Nine (9) to three (3). Exhibit 4.

16.

Georgia Laws 1966, pp. 2382-2386 amended the Charter of the City of Rome, (Ga. Laws 1918, pp. 813-885) to provide for the qualifications and salary of commissioners, for organization of the commission and for election by posts in each of the wards. Said laws also contained a majority vote requirement. Exhibit 5.

17.

Georgia Laws 1966, pp. 3069-3072 amended the Charter of the City of Rome (Ga. Laws 1918, pp. 813-885) to remove certain restrictions from voter qualifications. Exhibit 6.

18.

Georgia Laws 1966, pp. 2815-2819 amended the charter of the City of Rome (Ga. Laws 1918, pp. 813-885) to provide for a six-member city board of education and for the election of members to said board by posts with two posts for each of three wards, to be elected by a majority vote. Said laws also established a

framework for run-off elections when the majority vote feature had not been satisfied, and imposed a staggered-term provision and a sub-district residency requirement for Board of Education elections. Exhibit 7.

19.

Georgia Laws 1966, pp. 3083-3087 amended the Charter of the City of Rome (Ga. Laws 1818, pp. 813-885) to make provisions for the nomination fo candidates in city elections and for the conduct of primaries and elections. Exhibit 8.

20.

Georgia Laws 1967, pp. 3296-3298, corrected a typographical error in Georgia Laws 1966, pp. 2375-2378. Exhibit 9.

21.

Georgia Laws 1970, pp. 2563-2566 amended the Charter of the City of Rome (Ga. Laws 1918, pp. 813-885, as amended by Ga. Laws 1966, p. 2375) to change the election date of city commissioner elections and to provide for conduct of run-off elections. Exhibit 10.

22.

Georgia Laws 1971, pp. 3664-3666 amended the Charter of the City of Rome (Ga. Laws 1966, p. 2815) to change the election date of City Board of Education members and to provide for conduct of run-off elections. Exhibit 11.

23.

In addition to the foregoing, after November 1, 1964 some sixty (60) annexations to the City of Rome were effected either by local state law or local ordinance.

24.

The following annexations did not, and will not, have the effect of denying or abridging the right to vote on account of race, color or otherwise, and did not cause, and will not lead to, a retrogression of racial minorities with respect to their effective exercise of the electoral franchise in the City of Rome, Georgia:

Those annexations which have previously been described by the City of Rome (see Exhibit 12) in the following fashion:

G.E. Plant & Site
Brookwood Estate - Burnett Ferry Rd.
Maplewood - Jack Anderson
East 17th Street - Maurice Gann
Off Saddle Mountain - Jack Busbin
3 Lost Lenor Circle - Traylor
East 11th St. - Rogers & Culbreth
Briarcliff Road - Mt. View Annex
One lot
Catholic School & Home
One lot - Bob Cescutti
Commercial (Commercial Park)
Darlington Sch. Strip Land, Furnace Rd.
Commercial - Kellery Dye Co.
Waste Treatment Plant (City)
North Heights Elem. School (City)
Beakert Steel Co.
G. L. Sutton, Black's Bluff Road
1 Lot Atteiram Subdivision

Commercial - Coosa Baking Co.
Commercial - Integrated Products
Hidden Valley, Howell & Covington
Commercial Coca Cola Co. Barron Corp.
Commercial-Southern Wholesale
Westwood Sub. Clyde Chester
Fox Mfg. Co. Commercial, Old Lindale Rd.
Commercial Pharr Yarns, Huffacre Road
National City Bank, Martha Berry Blvd.
Berry Schools Comm., John Maddox Dr.
Hosp. Corp. of America, Redmond Park Hospital
Fellowship Baptist Church
Road Strip (Burnett Ferry Road)
Strip Road Old Lindale Road
Ramada Inn - Chas. Williams & Smith
Williamsom Street - Chas. Williams
End East 11th St. - Billy Towers
Saddle Mt. #3, Howell & Covington
Oostanaula River Pumping Station (City)
V. E. Anderson, Gateway
Waste Treatment Plant (City)
Turner Frozen Foods, Rockmart Road
Commercial Garden Lakes Inds. Blvd.
Red Diamond - Alabama Road
Commercial, East Gate, Dodd Blvd.
East Gate #2, Hwy. 411, Howell & Covington
Maplewood Park - Munchak
Hwy. 411 Woodfin Turner Property

The forty-seven annexations mentioned immediately above have been precleared pursuant to Section 5 by the Attorney General.

25.

The following thirteen annexations have not been precleared by the United States Attorney General:

Those annexations which have previously been described by the City of Rome (see Exhibit 12) in the following fashion:

(1) Saddle Mountain - Du Pre 4/8/65 (Exhibit 13)
(2) Holmes Acres - East 11th Extension 4/8/65 (Exhibit 13)
(3) Lyons Drive - West Rome - Ala. Road 4/8/65 (Exhibit 13)
(9) Georgian & Old Salem Apartments 4/18/66 (Exhibit 14)
(13) Battey Hospital 2/20/67 (Exhibit 15)
(16) Maplewood Square 5/1/67 (Exhibit 16)
(18) Garden Lakes Rollingwood Area 9/5/67 (Exhibit 17)
(20) Berkshire Estates 2/19/68 (Exhibit 18)
(39) W.A. Du Pre - Rockmart Road 2/16/70 (Exhibit 19)
(40) Westminister Apts., Harry Butler 5/4/70 (Exhibit 20)
(43) Castle Cove Subdivision Area 2/15/71 (Exhibit 21)
(52) Saddle Mt. #4, Bill Du Pre (Exhibit 22)
(53) Old Airport Community (Exhibit 23)

26.

On June 15, 1974, plaintiff City of Rome, by its chief legal officer and pursuant to Section 5, submitted to the Attorney General application for the approval of a 1973 annexation to the City of Rome of that area known as "the Old Airport Community", such area being an unincorporated portion of Floyd County, Georgia, which portion was completely surrounded by the City of Rome. Exhibit 23.

27.

By letters dated July 24, 1974, the Assistant Attorney General requested certain additional information with respect to the submission by Plaintiff City of Rome on June 15, 1974.

28.

On February 7, 1975, Plaintiff City of Rome, by its chief legal officer and pursuant to Section 5, provided additional information requested by the Assistant Attorney General on July 24, 1974, which letter was received on February 10, 1975. By letter dated March 6, 1975, the office of the Attorney General contended that the City did not forward all the information he had requested and requested that the missing information be submitted. The Attorney General received the remainder of the information on June 2, 1975.

29.

On February 10, 1975, Plaintiff City of Rome, by its chief legal officer and pursuant to Section 5, submitted to the Attorney General application for the approval of annexations consisting of fifty-nine (59) areas, including certain industrial areas. On March 6, 1975, certain additional information pertaining to this submission was requested and this information was received by the Department on June 2, 1975.

30.

The Attorney General interposed no objection to Georgia Laws 1966, pp. 2379-82, amending the Charter of the City of Rome to provide

for the reduction in the number of wards from nine (9) to three (3).

31.

By letter dated August 1, 1975, the Assistant Attorney General interposed an objection, pursuant to Section 5, to the annexations submitted by Plaintiff City of Rome on June 15, 1974 and February 10, 1975. On March 6, 1975, certain additional information pertaining to this submission was requested and this information was received by the Department on June 2, 1975.

32.

On August 21, 1975, Plaintiff City of Rome, by its chief legal officer and pursuant to Section 5, submitted to the Attorney General application with respect to certain electoral changes made since the effective date of the Voting Rights Act and sought reconsideration of the Attorney General's objection to earlier submissions.

33.

By letter dated October 20, 1975, the Assistant Attorney General interposed an objection, pursuant to Section 5, to the electoral changes submitted by Plaintiff City of Rome on August 21, 1975.

34.

By letter dated October 20, 1975, referred to above, the Attorney General withdrew his objection to forty-seven (47) of the sixty (60) annexations which collectively had been sub-

mitted by Plaintiff City of Rome on June 15, 1974 and February 10, 1975, which submission the Attorney General contends were completed on June 2, 1975.

35.

On May 24, 1976, Plaintiff City of Rome, by its chief legal officer, sought reconsideration of the Attorney General's objection to thirteen (13) of the annexations submitted on June 15, 1974 and February 10, 1975 and to the electoral changes submitted on August 21, 1975. One of the thirteen (13) annexations referred to was first submitted on June 15, 1974, the remaining twelve in question were submitted on February 10, 1975, and the Attorney General contends that both submissions were completed on June 2, 1975. In connection with its request for reconsideration, on July 14, 1976, the City of Rome provided the Attorney General with affidavits from two members of the black community in Rome.

36.

By letter dated August 12, 1976, the Assistant Attorney General withdrew his objection to the thirteen (13) annexations as they relate to the Rome Board of Education elections, but refused to withdraw the objection of the Attorney General to those thirteen (13) annexations as they relate to the Rome City Commission elections and also refused to withdraw the objection of the Attorney General to the electoral changes submitted on August 21, 1975.

37.

Since 1970, one black candidate (Rev. Clyde Hill) has run for the Rome Board of Education. (See Exhibits 28 and 29).

38.

Since 1970, one black candidate (Samuel Stubbs) has run in a primary for the Rome City Commission. (See Exhibit 32).

39.

No black person has ever been elected to the Rome City Commission.

40.

No black person has ever been elected to the Rome Board of Education.

41.

One black (Elgin Carmichael) was appointed to the Rome Board of Education in April, 1975.

42.

No elections for either the City Commission or the board of education have been held in Rome, Georgia since November 5, 1974.

43.

Section 34A-501(b) of The Code of Georgia of 1933 is shown in Exhibit 24.

44.

A City of Rome ordinance enacted pursuant to Georgia Code Section 34A-501(b) is shown in Exhibit 25.

45.

Returns for Board of Education elections in 1967 are shown in Exhibit 26.

46.

Returns for City Commission elections in November, 1970, are shown in Exhibit 27.

47.

Returns for Board of Education elections in December, 1970, are shown in Exhibit 28.

48.

Returns for Board of Education run-off elections in December, 1970, are shown in Exhibit 29.

49.

Returns for City Commission and Board of Education elections in November, 1972, are shown in Exhibit 30.

50.

Returns for City Commission and Board of Education elections in November, 1974, (Rome's last election) are shown in Exhibit 31.

51.

Returns for the Rome City Commission Republican Primary in 1972 are shown in Exhibit 32.

52.

The approximate breakdown of black registered voters in the City of Rome as of November 23, 1977, is shown in Exhibit 33.

(Signatures and Certificate of Service Omitted in Printing)

Exhibit "1"

PART III.-TITLE I.-Municipal Corporations.

ROME, CITY OF; NEW CHARTER
No. 522.

An Act to create a new charter and municipal government for the city of Rome; to define the rights and powers of the municipality; to define the corporate limits thereof and to repeal all former charters and all laws in conflict therewith.

* * * * * * * * * * *

Sec. 3. Be it further enacted by the authority aforesaid, That the governing and legislative authority of said city shall be vested in a commission of seven members. The members of said commission shall have attained the age of twenty-one (21) years, and shall have been residents and citizens of said city for at least two years next preceding their election, and shall be qualified voters of the city of

Rome. Each member of said commission shall receive a salary of two hundred ($200.00) dollars per annum. At their first meeting, or so soon thereafter as possible, the members of said commission shall elect one of their number as chairman, who shall receive an additional salary of four hundred ($400.00) dollars per annum. The chairman, or in his absence, the chairman pro tem., shall preside over the deliberations of the commission and shall have the right to vote on all questions; he shall preserve order and decorum at all meetings of the commission and shall enforce the rules of that body, and shall have power to punish all persons for contempt of such rules, and shall perform all other duties incident to his office. Service of legal process directed to or against the city shall be served upon the chairman of the commission. One of said commissioners shall be elected from each ward of the city, but shall be elected by the consolidated vote of the entire city. Said commissioners shall be elected for a term of four years, except as hereinafter provided, and until their successors are elected and qualified, subject, however, to recall, as is hereinafter provided.

Sec. 4. Be it further enacted by the authority aforesaid, That an election shall be held in said city on the first Tuesday in March, 1919, to elect said commissioners, who shall hold office from the first Monday in April, 1919, to the first Monday in January, 1921. On the first Tuesday in December, 1920, and quadrennially thereafter, an election shall be held for the purpose of electing said commissioners for a term of four years, beginning on the first Monday in January thereafter. In all elections the candidate from each ward receiving the highest vote shall be declared elected. The

present city commissioners shall remain in office until the first Monday in April, 1919.

* * * * * * * * * * *

Sec. 84. Be it further enacted by the authority aforesaid, That a board of education, to consist of five (5) members, be and the same is hereby established. The members of said board at the time of and during their continuance in office shall be bona fide residents and citizens of said city of Rome. They shall be upright and intelligent citizens of said city and shall hold office for a term of four (4) years, and until their successors are elected and qualified. The present board of education of said city shall continue in office until the first Monday in April, 1919, or until their successors are elected and qualified. That on the first Tuesday in March, 1919, when the Rome city commission is elected, and quadrennially thereafter, there shall be elected by the qualified voters of said city in said general election, five (5) members of said board. Vacancy in said board of education caused by death, resignation, removal, disqualification or otherwise, shall be filled by the remaining members of said board.

Approved August 19, 1918.

Exhibit "28"

MINUTES CALLED MEETING
ROME CITY COMMISSION
DECEMBER 2, 1970

The meeting was called to order by Chairman, Ben Lucas who stated that the meeting was called for the purpose of receiving the

results of the General Election, held on December 1, 1970, for three members of the Rome School Board of Education.

The following Commissioners were present: Lucas, Oldham, Holcombe, Caldwell, Harvey, McEver, Hunter and Tolbert.

Mr. Marion Morris presented the consolidated returns of the Election as follows:

ELECTION RETURNS (1)

Upon motion of Commissioner Tolbert, second of Commissioner Hunter, the report of the Election Manager was approved.
Ayes: Oldham, Holcombe, Caldwell, Harvey, McEver, Hunter and Tolbert.
Noes: None.

A Resolution calling for a Run-Off election to fill post 2 Ward 2, to be held on Tuesday, December 15, 1970, as provided by the Charter of the City of Rome, was upon motion of Commissioner McEver, second of Commissioner Oldham, adopted as follows:

RESOLUTION (2)

Ayes: Oldham, Holcombe, Caldwell, Harvey, McEver, Hunter and Tolbert.
Noes: None.

There being no further business, upon motion of Commissioner Oldham, second of Commissioner McEver, the meeting adjourned.
Ayes: Oldham, Holcombe, Caldwell, Harvey, McEver, Hunter and Tolbert.
Noes: None.

/S/

Mrs. Ray Beard, Secretary
ROME CITY COMMISSION

WHEREAS, in the election to fill posts on the City of Rome Board of Education held December 1, 1970, no candidate for Post 2 of Ward 2 received a majority of the consolidated votes of the entire city; and

WHEREAS, in such cases, the Charter of the City of Rome and the Georgia Municipal Election Code provide for a run-off election.

NOW THEREFORE, be it resolved that there will be held on Tuesday, December 15, 1970, a run-off election between Dr. Sara L. Hoyt and the Reverend Clyde Hill, Sr. Said election will be conducted in the Lobby of the City Auditorium in Rome, Georgia in accordance with the applicable law, and the candidate receiving a majority of the votes in said run-off election shall fill Post 2 of Ward 2 on the said Board of Education.

MEMBERS BOARD OF EDUCATION
CONSOLIDATED CITY OF ROME RETURNS

We the undersigned Superintendant, Manager and Assistant Managers for the City Board of Education Election held on Tuesday the 1st day of December, 1970, in the City of Rome, Georgia, Election Districts of Floyd County, Georgia, do, jointly and severally, certify that we have met and consolidated the returns of the City of Rome, Georgia in the said General Election and it appears that: for the Office of Members Board of Education received the Total number of Votes as follows:

NAME	TOTAL NUMBER OF VOTES
WARD 1 - POST 2	
Jack H. Anderson	1582
Mrs. Arnell Stone	417
WARD 2 - POST 2	
Jean V. Anderson	407
Rev. Clyde Hill, Sr.	921
Dr. Sara L. Hoyt	909
Rev. Warren L. Jones	143
WARD 3 - POST 2	
Mrs. Dolph Kennedy	1180
Mrs. Suzanne W. Smith	810
	2400

IN TESTIMONY WHEREOF, We, the Managers, Superintendent and Assistant Managers, have hereunto set our hands and seals this 1st, day of December, 1970 Signed in Triplicate.

/s/ _____ SUPERINTENDENT
/s/ _____ MANAGER
/s/ _____ MANAGER
/s/ _____ MANAGER

Exhibit "29"

MINUTES CALLED MEETING
ROME CITY COMMISSION
DECEMBER 16, 1970

The meeting was called to order by the Chairman Ben Lucas, who stated that the meeting was called for the purpose of receiving the returns of the Run-Off Election for members from Ward 2 Post 2, for the City Board of Education, held on December 15, 1970.

The following Commissioners were present: Lucas, Oldham, Caldwell, Harvey and Hunter.

Mr. Marion Morris, Manager of the above Run-Off Election, read the following statement of the consolidated returns of the Election.

(COPY OF REPORT)

Upon motion of Commissioner Oldham, second of Commissioner Caldwell, the Election Returns were approved.
Ayes: Lucas, Oldham, Caldwell, Harvey and Hunter.
Noes: None.

Commissioner Hunter made a motion, seconded by Commissioner Caldwell, that Mr. Morris, as well as the other managers and workers, be commended for the efficient manner in which the Election was conducted.
Ayes: Lucas, Oldham, Caldwell, Harvey and Hunter.
Noes: None.

There being no further business, upon motion of Commissioner Caldwell, second of Commissioner Hunter, the meeting adjourned.
Ayes: Lucas, Oldham, Caldwell, Harvey and Hunter.
Noes: None.

/S/

Mrs. Ray Beard, Secretary

MEMBERS BOARD OF EDUCATION
CONSOLIDATED CITY OF ROME RETURNS

We the undersigned Superintendent, Manager and Assistant Managers for the City Board of Education Election (Run-Off) held on Tuesday, the 15th day of December, 1970, in the City of Rome, Georgia, Election Districts of Floyd County, Georgia, do, jointly and severally, certify that we have met and consolidated the returns of the City of Rome, Georgia in the said General Election and it appears that: for the Office of Members Board of Education received the Total number of Votes as follows:

NAME	TOTAL NUMBER OF VOTES
WARD 2 - POST 2	
Rev. Clyde Hill, Sr.	1142
Dr. Sara L. Hoyt	1409
TOTAL VOTES CAST	2551

IN TESTIMONY WHEREOF, We, the Managers, Superintendent and Assistant Managers, have hereunto set our hands and seals this 15th day of December, 1970. Signed in Triplicate.

/s/_____SUPERINTENDENT
/s/_____MANAGER
/s/_____MANAGER
/s/_____MANAGER

Exhibit "32"

CONSOLIDATED CITY OF ROME RETURNS
FOR
REPUBLICAN PARTY PRIMARY

We, the undersigned Superintendent and his Assistants for the City of Rome Primary held on Tuesday, the Eighth day of August, 1972, in City of Rome, Floyd County, Georgia, do jointly and severally certify that we have met and consolidated the returns of the Election Districts of this County in the said General Primary and that the following are the results:

FOR MEMBER OF ROME
CITY COMMISSION

WARD 2, POST 2

JAMES F. MILAM	Received 197	votes
SAMUEL B. STUBBS	Received 79	votes

FOR MEMBER OF ROME
BOARD OF EDUCATION

WARD 1, POST 1

JOEL L. JONES	Received 209	votes

IN TESTIMONY WHEREOF, We, the Superintendent and his Assistants aforesaid, have hereunto set our hands and seals this 12th day of August, 1972.

SIGNED IN QUADRUPLICATE.

Attest:

/s/ (Seal) /s/ (Seal)
Superintendent

/s/ (Seal)

/s/ (Seal)
Assistants

(Seal)

(Seal)

(Seal)

* * * * * * * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Title Omitted in Printing)

DEFENDANTS' RESPONSE TO PLAINTIFFS' FIRST REQUEST FOR ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS

Filed January 11, 1978

6.

Sections 34A-102 and 34A-1407(a) of the Georgia Municipal Election Code were precleared by the United States Attorney General as of June 13, 1968, as more fully appears in the copy of the letter from the Justice Department, attached hereto as "Exhibit A".

ANSWER: Defendants admit the truth of Request No. 6.

7.

Georgia Laws 1966, pp. 2375-2378, amending the charter of the City of Rome, were validly enacted by the Georgia General Assembly.

ANSWER: Defendants admit that Georgia Laws 1966, pp. 2375-2378, were validly enacted by the Georgia General Assembly, but have not been precleared under Section 5 of the Voting Rights Act.

8.

Georgia Laws 1966, pp. 2379-2382, amending the Charter of the City of Rome, were validly enacted by the Georgia General Assembly.

ANSWER: Defendants admit that Georgia Laws 1966, pp. 2379-2382, were validly enacted by the Georgia General Assembly, but have not been precleared under Section 5 of the Voting Rights Act.

9.

Georgia Laws 1966, pp. 2382-2386, amending the Charter of the City of Rome, were validly enacted by the Georgia General Assembly.

ANSWER: Defendants admit that Georgia Laws 1966, pp. 2382-2386, were validly enacted by the Georgia General Assembly, but have not been precleared under Section 5 of the Voting Rights Act.

10.

Georgia Laws 1966, pp. 3069-3072, amending the Charter of the City of Rome, were validly enacted by the Georgia General Assembly.

ANSWER: Defendants admit that Georgia Laws 1966, pp. 3069-3072, were validly enacted by the Georgia General Assembly, but have not been precleared under Section 5 of the Voting Rights Act.

11.

Georgia Laws 1966, pp. 2815-2819, amending the Charter of the City of Rome, were validly enacted by the Georgia General Assembly.

ANSWER: Defendants admit that Georgia Laws 1966, pp. 2815-2819, were validly enacted by the Georgia General Assembly, but have not been precleared under Section 5 of the Voting Rights Act.

12.

Georgia Laws 1966, pp. 3083-3087, amending the Charter of the City of Rome, were validly enacted by the Georgia General Assembly.

ANSWER: Defendants admit that Georgia Laws 1966, pp. 3083-3087, were validly enacted by the Georgia General Assembly, but have not been precleared under Section 5 of the Voting Rights Act.

13.

Georgia Laws 1967, pp. 3296-3298, amending the Charter of the City of Rome, were validly enacted by the Georgia General Assembly.

ANSWER: Defendants admit that Georgia Laws 1967, pp. 3296-3298, were validly enacted by the Georgia General Assembly, but have not been precleared under Section 5 of the Voting Rights Act.

14.

Georgia Laws 1970, pp. 2563-2566, amending the Charter of the City of Rome, were validly enacted by the Georgia General Assembly.

ANSWER: Defendants admit that Georgia Laws 1970, pp. 2563-2566, were validly enacted by the Georgia General Assembly, but have not been precleared under Section 5 of the Voting Rights Act.

15.

Georgia Laws 1971, pp. 3664-3666, amending the Charter of the City of Rome, were validly enacted by the Georgia General Assembly.

ANSWER: Defendants admit that Georgia Laws 1971, pp. 3664-3666, were validly enacted by the Georgia General Assembly, but have not been precleared under Section 5 of the Voting Rights Act.

16.

The annexation referred to in Paragraph 38 of Plaintiffs' First Amended Complaint was validly enacted by the Georgia General Assembly.

ANSWER: Defendants admit that the annexation referred to in Paragraph 38 of Plaintiffs' First Amended Complaint was validly enacted by the Georgia General Assembly, but has not been precleared under Section 5 of the Voting Rights Act.

17.

The fifty-nine (59) annexatons referred to in Paragraph 41 of Plaintiffs' First Amended Complaint were validly enacted by either the Georgia General Assembly or the Rome City Commission.

ANSWER: Defendants admit that fifty-nine (59) annexations were validly enacted by either the Georgia General Assembly or the Rome City Commission, but that twelve (12) of those annexations have not been precleared under the Voting Rights Act.

42.

The enactment of laws is an integral and traditional function of the state and local government.

ANSWER: Defendants admit Request No. 42.

43.

The enactment of laws is an integral and traditional function of the City of Rome, Georgia.

ANSWER: Defendants admit Request No. 43.

44.

The conduct of elections is an integral and traditional function of state and local government.

ANSWER: Defendants admit Request No. 44.

45.

The conduct of elections is an integral and traditional function of the City of Rome, Georgia.

ANSWER: Defendants admit Request No. 45.

(Signatures and Certificate of Service Omitted in Printing)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDANTS' RESPONSE TO
PLAINTIFFS' FIRST INTERROGATORIES
(Title Omitted in Printing)

Filed January 11, 1978

Attachment B

Date: November 19, 1970

TO : All Attorneys
Voting & Public Accommodations

FROM : Gerald W. Jones, Chief
Voting & Public Accommodations

SUBJECT : Preliminary Review of
Section 5 Submissions

In the past few weeks several situations have arisen with respect to Section 5 submissions wherein we have been faced, on the eve of the expiration of the 60-day submission period, with the necessity of sending letters to the submitting party advising of some defect which prevents our responding in a substantive way. In order to alleviate this situation recurring, each of you should follow the following procedures when a Section 5 matter is assigned to you.

As soon as you receive the submission, you should give it a preliminary review and analysis to determine whether such things as basic additional and supporting documents are necessary to a proper analysis of the submission, whether or not the submission involves a final enactment if it is legislation, and generally whether the submission is in a form which makes it ripe for the Attorney General's consideration. In Mississippi for instance where state enabling legislation allowing at-large elections for county supervisors was objected to by the Attorney General, the only operable legislation in the state at present authorizes district-by-district elections only. Therefore, should a

submission be received from a Mississippi county which seeks to authorize at-large elections, this should be detected promptly and a proper response to the submitting authority should be prepared without waiting until all or most of the 60-day period has run. Also in Mississippi the enabling legislation on redistricting requires a unanimous vote by the county governing body (Board of Supervisors). Here, too, if less than all five of the county's supervisors have voted for the redistricting plan as submitted, this should be detected right away and responded to. In those instances where the submission as initially submitted is completely inadequate for us to consider because of failure on the part of the submitting party to send appropriate supporting documents and information, this should be detected right away so that they can be asked for and the submitting party can be advised that the 60-day period will not begin to run until such time as the submission is complete. Needless to say it is very embarrassing to have to write a letter of this nature after we have had the submission for 45 or more days.

In view of the foregoing, each of you should confer with either Mr. Gorman or myself within one week of the date your receive a submission with respect to your preliminary review so that we may be advised of any problems which should be taken care of preliminarily.

* * * * * * * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDANTS' RESPONSE TO
PLAINTIFFS' THIRD INTERROGATORIES
(Title Omitted in Printing)

Filed April 14, 1978

Interrogatory No. 32

Please DESCRIBE all facts which Defendants contend support the existence of any of the following in the City of Rome:

(a) Barriers to black registration, with respect to:
  (1) Time and place of registration
  (2) Registration personnel
  (3) Purging and reregistration
(b) Barriers to black voting, with respect to:
  (1) Denying minorities the ballot
  (2) Polling places: location and adequacy
  (3) Election officials
  (4) Inadequate Bilingual information and materials
  (5) The problems of illiterate voters
  (6) Absentee voting
(c) Barriers to black candidacy, with respect to:
  (1) Filing fees
  (2) Obstacles to qualifying
  (3) Campaigning
  (4) Access to voters at the polling place
  (5) Poll watchers
  (6) Counting the vote
  (7) Obstacles to multiracial and multiethnic politics
  (8) Problems of independent and third party candidates

(9) Minimizing the impact of minority success

(d) Physical and economic subordination of blacks

(e) Lack of fair representation of blacks on city boards

Response to Interrogatory No. 32

Defendants have made no contention that they have facts which support the existence or non-existence of the information sought in (a) through (d) above. However, defendants have taken the oral deposition of a number of blacks in the Rome community whose testimony supports the existence of (e) above, that is, there is a "lack of fair representation of blacks on city boards."

(Signatures and Certificate of Service Omitted in Printing)

* * * * * * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Title Omitted in Printing)

PLAINTIFFS' SECOND SUPPLEMENT
TO THEIR FIRST AMENDED COMPLAINT

Filed April 17, 1978

Plaintiffs hereby supplement their First Amended Complaint, once supplemented, by adding the following:

I.

After Paragraph 17 and before Paragraph 18 thereof:

"17A".

"When the Georgia Municipal Election Code was submitted to the United States Attorney General as aforesaid, no objection was interposed by him to Section 34A-1407(b), or to Section 34A-902 thereof."

"17B".

"Georgia Code Section 34A-1407(b) provides as follows:

"In instances where no candidate receives a majority of the votes cast and the municipal charter or ordinance does not provide for nomination or election by a plurality vote, a runoff primary or election shall be held, between the two candidates receiving the highest number of votes. Such runoff shall be held on the fourteenth day after the day of holding the first primary or election, unless such runoff date is postponed by court order. Only the electors entitled to vote in the first primary or election shall be entitled to vote in any runoff primary or election resulting therefrom; provided, however, that no elector shall vote in a runoff primary in violation of Section 34A-518. The candidate receiving a majority of the votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner. The runoff primary or election shall be a continuation of the first primary or

election and only those votes cast for the two candidates receiving the highest number of votes in the first primary or election shall be counted. No write-in votes may be cast in a primary, runoff primary, or runoff election. If the candidate receiving the highest number of votes withdraws, the remaining candidates receiving the two highest number of votes shall be the candidates in the runoff. If the candidate receiving the second highest number of votes withdraws, no runoff shall be held and the candidate receiving the highest number of votes shall be nominated or elected as the case may be. If any candidate eligible to be in a runoff dies, or one of the two candidates originally receiving the highest number of votes is found to be ineligible, the remaining candidates receiving the two highest number of votes shall be the candidates in such runoff. The candidate receiving the highest number of votes cast in such runoff primary or election to fill the nomination or public office he seeks shall be declared the winner. The name of a write-in candidate eligible for election in a runoff shall be printed on the runoff election ballot in the independent column."

"17C".

"Georgia Code Section 34A-902 provides as follows:

"In the case of a candidate seeking one of two or more public offices each having the same title and to be filled at the same election by the vote of the same electors, charter or ordinance provisions now in effect or hereinafter enacted shall govern whether such candidate shall designate the specific office he is seeking. If required to designate the specific office, the candidate shall name his incumbent or give other appropriate designation. Such designation shall be entered on the ballot and ballot labels in such manner that in the ensuing primary or election such candidate shall only oppose the other candidate or candidates, if any, designating the same specific office."

"17D".

"As of the effective date of the said Georgia Municipal Election Code, and Section 34A-1407(b) thereof, the Charter of the City of Rome did not provide for nomination or election by a plurality vote."

"17E".

"As of the effective date of the Georgia Municipal Election Code, and section 34A-902 thereof, the Charter of the City of Rome provided that a candidate designate the specific office he was seeking, to-wit: Post Number 1, Post Number 2 or Post Number 3 of the ward of his residency."

II.

After Paragraph 58 and before Paragraph 59 thereof:

"58A".

"Because of the facts set out in Paragraphs 17A through 17E hereof, Georgia Laws 1966, Pages 2375-2378, 2382-2386, (the runoff election provision and the numbered post provision for Rome City Commission) and Georgia Laws 1966, pages 2815-2819 (the run-off election provision and the numbered post provision for Rome Board of Education) have already been precleared by the Attorney General and require no further action by Plaintiff City of Rome."

III.

After subparagraph (a) of the prayer of Count III hereof, and before subparagraph (b) of said prayer:

(a)(1) that Georgia Laws 1966, Pages 2375-2378, 2382-2386 (the runoff election provision and the numbered post provision for Rome City Commission) have already been precleared by the Attorney General; and (a)(2) that Georgia Laws 1966, pages 2815-2819 (the run-off election provision and the numbered post provision for Rome Board of Education) have already been precleared by the Attorney General; and"

(Signatures and Certificate of Service Omitted in Printing)

* * * * * * * * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Title Omitted in Printing)

SECOND SUPPLEMENT TO
PARTIES STIPULATION OF FACTS

Filed April 19, 1978

7. Pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, the State of Georgia submitted Georgia Code Section 34A-902 to the United States Attorney General on May 13, 1968. There was no objection interposed by the Attorney General of the United States to Georgia Code Section 34A-902.

8. Exhibit 44 is except for the attachments thereto which have not been copied, a true, correct and authentic reproduction of the State of Georgia's May 13, 1968 submission of the Georgia Municipal Election Code. Georgia Code Section 34A-902 was included as part of this submission.

10. Exhibit 45 hereto is a true, correct and authentic reproduction of correspondence between the City of Rome and the Department of Justice during the course of the Attorney General's review and reconsideration of those changes submitted pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. While several of these items have previously appeared in the record (see Exhibits C through H contained in paragraphs 46 to 52 of

Plaintiffs' First Request for Admission of Facts and Genuineness of Documents), the parties have included them in this stipulation so as to present in an orderly fashion, the Section 5 correspondence between the City of Rome and the United States.

(Signatures and Certificate of Service Omitted in Printing)

EXHIBIT 44

APPLICATION BY THE
STATE OF GEORGIA TO THE
ATTORNEY GENERAL OF THE
UNITED STATES FOR APPROVAL OF:

THE GEORGIA MUNICIPAL
ELECTION CODE
AND ACT NO. 993
ENACTED IN 1968

THE STATE OF GEORGIA

BY: ARTHUR K. BOLTON
Attorney General

Harold N. Hill, Jr.
Assistant Attorney General

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
525-0401

EXHIBIT INDEX

Appendix A - Georgia Municipal Election Code (Act No. 998, S. B. 151) Annexed

Appendix B - Georgia Election Code, as amended through 1966 (blue cover) Annexed

Exhibit A - Table of Contents of the Municipal Election Code

Exhibit B - Page Proofs of 1968 reprint of the Georgia Election Code

Exhibit C - H. B. 1087 (Act No. 993)

APPLICATION BY THE
STATE OF GEORGIA TO THE
ATTORNEY GENERAL OF THE
UNITED STATES FOR APPROVAL OF:

THE GEORGIA MUNICIPAL
ELECTION CODE
AND ACT NO. 993
ENACTED IN 1968

Now comes the State of Georgia, by and through its Attorney General, and respectfully requests the approval of the Attorney General of the United States of:

The Georgia Municipal Election Code and Act No. 993 enacted at the 1968 Session of the General Assembly of Georgia.

I.

This application and submission is made pursuant to Section 5 of the "Voting Rights Act of 1965", Public Law 89-110, Aug. 6, 1965, 42 U.S.C.A. Section 1973c (which applies to voting qualifications, prerequisites to voting, and standards, practices and procedures with respect to voting).

II.

Heretofore, the laws governing municipal elections have been contained in the charters of the more than 400 incorporated towns and cities in Georgia. These charter provisions as to elections have been amended from time to time (e.g. Abbeville - Ga. Laws 1943, p. 1151; Zebulon - Ga. Laws 1961, pp. 2704, 2707-2714). At the 1961 Session of the General Assembly new charters were enacted for seven municipalities and the existing charters of seven other municipalities were amended as to elections (see Ga. Laws 1961, Vol. II, pp. 3534-3537). As a consequence, there have been as many or more variations in the municipal election laws in Georgia as there are municipalities.

III.

At the 1968 Session of the General Assembly of Georgia, there was enacted the "Georgia Municipal Election Code", a copy of which is annexed hereto as Appendix A, to become effective September 1, 1968, which codifies and makes uniform (see Sections 34A-102 and 34A-104) throughout the State (with certain options hereinafter noted) municipal election laws.

IV.

The Georgia Municipal Election Code is patterned after the Georgia Election Code of 1964, as amended. A copy of the Georgia Election Code as amended through 1966 is annexed hereto as Appendix B. Application for approval of the changes in the Georgia Election Code adopted in 1968 has been made by prior submission. It should be noted that the Georgia Election Code (Appendix B hereto) is not applicable to municipal elections (Code Section 34-102). Attached hereto as Exhibit A is a table of contents of the Municipal Election Code, with a cross-reference index to the Georgia Election Code.

V.

In view of the variety of laws which heretofore existed, no effort will be made herein to set forth the prior laws superseded by the Municipal Election Code. In view of its comprehensive nature, the Municipal Election Code when read in sequence is comprehensible, and therefore only its more significant features will be discussed herein.

VI.

The major areas in which the Municipal Code differs from the Election Code are as follows (The comments below are taken from a Report to the General Assembly from the State Election Board.):

(1) Municipal elections will be held on dates provided now or subsequently in the charter or ordinance of the municipality, rather than on the general election dates. Section 34A-702.

(2) The governing authority of the municipality will appoint the municipal election superintendent, who may or may not be the ordinary of the county. Sections 34A-201(c), 34A-302.

(3) Absentee ballots will be used only if the municipal governing authority elects to use them (If absentee ballots are used, then the general provisions of the Code covering absentee ballots will be applicable, except that an absentee ballot clerk, designated by the governing authority, will handle the applications, witnessing, and other duties normally handled by the county registrar.). Ch. 34A-13.

(4) Whether the majority or plurality rule is in effect in the municipal election will depend upon how the municipality's charter is written at present or may be written in future (i.e., charter may provide that the top 3 or top 5, etc., be elected as city commissioners). Section 34A-1407.

(5) In the same vein, posts need not be designated where more than one person is to be elected unless the municipality's charter now or in the future calls for a majority vote where posts are designated. Section 34A-902.

(6) Partisan or nonpartisan primaries are permitted if the municipality so desires, or only a nonpartisan general election may be provided. Sections 34A-905, 34A-912, 34A-913.

(7) Registration may be provided at the election of the governing authority of the municipality in either one of two ways: (1) Use county registration list, which is submitted to municipality for purging of those not qualified; or, (2) Maintain their own registration system. Sections 34A-501(b), 34A-507, 34A-516(b).

(8) Times for closing registration books depend on whether county list is used or municipality maintains its own list. Closing for county list is 30 days before primary or election. Closing for municipal list shall be as specified by Charter, but at least 15 days and not more than 50 days prior to such primary or election. Section 34A-507.

(9) Provides that candidate in municipal primaries or elections file notice of candidacy at least 15 but not more than 45 days prior to the election in a general election or a general primary, and at least but not more than 30 days prior to the election in case of a special primary or election. Closing date to be set in municipal charter or ordinance. Section 34A-901(a).

(10) Nonpartisan primaries may be called by governing authority if municipality so elects. Date of such primary shall be at least 50 days but not more than 60 days prior to date of municipal election. Candidates shall qualify at least 45 days prior to date of primary, in accordance with privisions of the municipal charter and ordinances. Sections 34A-912, 34A-913.

(11) Governing authority of municipality appoints municipal superintendent and poll officers; designates election districts and polling places, makes rules and regulations (consistent with law and rules of State Election Board); fixes qualifying fees (if any); and, receives election returns. Ballots, tally sheets, and election lists are filed with City Clerk. Sections 34A-201, 34A-904, 34A-1410.

VII.

It is assumed that you will be interested in Chapter 34A-5 of the Municipal Code (Appendix A) relating to registration of electors.

A. Your attention is called to the provision of Section 34A-501(a) which reads as follows:

> "Notwithstanding any other provision of this Chapter, any person who was qualified and registered to vote at the time of the adoption of this Code shall not be required to re-register under the terms of this Chapter unless such person shall have become or becomes disqualified to vote by reason of having been purged from the list of electors or for any other reason whatsoever, in which event, such person shall, in order to become registered to vote, re-register under the terms of this Chapter." (Underscoring added.)

B. Your further attention is called to that provision in Code Section 34A-501(b) which reads as follows:

> "The qualifications of a person seeking to vote in a municipal primary or election shall be determined by the provisions of this Code and of the State Constitution."

It is, of course, recognized, as will be pointed out in more detail hereinafter, that certain provisions of State law and the State Constitution have been superseded by the Voting Rights Act of 1965.

C. Your attention is also called to subsection (c) of Code Section 34A-506 which reads as follows:

> "(c) The main office of the board of registrars in each municipality shall remain open for business during regular office hours on each business day. The board of registrars may enlarge such minimum office hours and may open the offices at any time in order to suit the convenience of the public."

See also the last sentence in subsection (b) of Code Section 34A-506 which provides that:

> "The governing authority in addition to the main office, may designate other places in the municipality to be used for the purpose of receiving applications for registration and for the registration of electors."

D. Section 34A-512, which refers to "qualification test" will bear the notation: "The operation of this section has been suspended by virtue of the Voting Rights Act of 1965. STATE ELECTION BOARD". In addition, the

reprint of the Georgia Election Code (now being printed), containing the amendments through the regular session of 1968, will bear similar notations at Sections 34-617 and 34-618 (referred to in said Section 34A-512 of the Municipal Code), as shown by the copy of page proofs, attached hereto as Exhibit B, of the reprint of the Georgia Election Code.

E. Your attention is called also to Section 34A-1211(b) relating to "Assistance in Voting" which authorizes one person to assist up to five disabled or handicapped voters. This provision is similar to Section 13 of Act No. 997, 1968 General Assembly, amending Code Section 34-1317(b) of the Georgia Election Code, as shown in par. V, subpar. (m)(13), pp. 15-16, of applicant's submission of changes in the Georgia Election Code enacted in 1968.

VIII.

Because there has been a pressing need in Georgia to eliminate the duplication of county and municipal voter registration, in addition to the provisions of the Municipal Election Code authorizing municipalities to use county registration lists (see Code Sections 34A-501(b), 34A-507, and 34A-516(b) of Appendix A hereto), there was enacted at the 1968 Session of the Georgia General Assembly Act No. 993 (H. B. No. 1087), a copy of which is attached hereto as Exhibit C. In addition to the Municipal Election Code, Act No. 993 is submitted with this application for approval.

The Municipal Election Code was approved by the Governor on April 4, 1968, and Act No. 993 was approved the preceding day, April 3, 1968. This sequence was intentional so that if there be any conflict between

Act No. 993 and the Municipal Election Code, the Municipal Code would control. However, no conflict between the two is known to exist.

Act No. 993 provides simply that:

> "The governing authority of municipalities may elect to arrange for the registration of municipal electors by adopting a resolution, or other appropriate measure, providing that any person who is a resident of the municipality and who is registered as an elector with the board of registrars of the county and possesses the qualifications prescribed by laws and Constitution of this State shall be eligible to vote in a municipal primary or election. Upon request, and upon a basis to be agreed upon by the governing authority and the municipality, the board of registrars shall deliver a copy of the electors list to be used in each municipal primary or election to the designee of the governing authority of the municipality at least fourteen (14) days prior to each such primary or election for the purpose of permitting him to check the accuracy of the list to to [sic] challenge the disqualified."

Regarding the first sentence quoted above, compare subsection(b) of Section 34A-501 of the Municipal Code (Appendix A). Regarding the second sentence quoted above, compare subsection (b) of Code Section 34A-516 of the Municipal Code. The phrase "to challenge the disqualified", as it appears in Act No. 993 and in Code Section 34A-516(b), is primarily intended to permit the municipality to remove from the

list supplied by the county board of registrars the names of any persons who reside in the county but not in the city, or who have not resided in the city for at least ninety (90) days next preceding the date of the municipal primary or election (see App. A, Code Section 34A-501[a]).

IX.

It is the position of the applicant that many of the provisions of the Municipal Election Code are not within the scope of Section 5 of the Voting Rights Act of 1965. However, out of an abundance of caution, applicant herewith submits for approval the Municipal Election Code in its entirety and Act No. 993 referred to in paragraph VIII.

X.

Applicant shows that the foregoing Code and Act do not have as their purpose, and will not have the effect of, denying or abridging the right to vote, on account of race or color or otherwise. On the contrary, they have as their purpose and effect the extension, facilitation and protection of the right to register and vote.

XI.

Georgia has no official record of its legislative proceedings which would be useful in ascertaining the legislative history and intent of its enactments. However, this office will furnish any requested material or information which might be helpful in reviewing the foregoing.

This 14th day of May, 1968

Respectfully submitted,

THE STATE OF GEORGIA

BY /s/
ARTHUR K. BOLTON
Attorney General

Harold N. Hill, Jr.
Assistant Attorney General

132 Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
525-0401

EXHIBIT 45

CITY OF ROME
GEORGIA

June 13, 1974

Robert M. Brinson
City Attorney

Assistant Attorney General
Civil Rights Division

Department of Justice
Washington, D.C. 20530

Re: City of Rome, Georgia
Civil Rights Act

Gentlemen:

Although the within described annexation was effected by the State Legislature, I am unaware of any submission to you; therefore, I herewith submit an annexation changing the boundaries of the City of Rome.

Yours very truly,

/s/
ROBERT M. BRINSON

RMB/ja
enclosure

APPLICATION BY CITY OF ROME, GEORGIA, TO THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE APPROVAL OF CERTAIN CHANGES IN THE ELECTION PROCEDURE (SUBMISSION UNDER SECTION 5, VOTING RIGHTS ACT)

CITY OF ROME, GEORGIA

BY: _____
CITY ATTORNEY

P.O. Drawer N
Rome, Georgia 30161

Now comes the City of Rome, Georgia by and through its City Attorney and respectfully requests the approval of the Attorney General of the United States of the following boundary change.

1.

This application and submission is made pursuant to Section 5 of the Voting Rights Act of 1965, Public Law 89-110, August 6, 1965, 42 USC Section 1973C.

2.

The 1973 General Assembly of the State of Georgia passed an Act incorporating into the corporate limits of the City of Rome certain tracts of land. A copy of said Act with descriptions of said tracts is attached hereto as Exhibit "A".

3.

Said annexations consisted of industrial areas and a larger area, known locally as "the Old Airport Community," which had theretofore been an unincorporated "island" completely surrounded by the City of Rome. Said area was without city services, including sewerage, and there was an existing opinion that the area was growing hazardous to public health and, moreover, that logically it should be incorporated into the City.

4.

The annexations were accomplished to remedy the effect of abandonment of the area and to extend needed city services thereto.

5.

The changes did not have as their purpose, and will not have the effect of denying or abridging the right to vote on account of race, color or otherwise.

6.

The applicant has no other information or supporting materials to assist the Attorney General in his consideration, but will endeavor to furnish material or information requested.

Respectfully submitted,

THE CITY OF ROME, GEORGIA

BY: /s/ P. O. Drawer N
Rome, Georgia 30161

EXHIBIT "A"

GEORGIA LAWS 1973 SESSION

CITY OF ROME-CHARTER
AMENDED-CORPORATE LIMITS
CHANGED.

No. 603 (House Bill No. 984)

An Act to amend an Act creating a new charter for the City of Rome, approved August 19, 1918 (Ga. L. 1918, p. 813), as amended, so as to change and extend the corporate limits of said City; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. An Act creating a new charter for the city of Rome, approved August 19, 1918 (Ga. L. 1918, p. 813), as amended, is hereby amended by extending and increasing the corporate limits of the City of Rome so as to include and annex to said corporate limits the following described tracts of property, to wit:

TRACT ONE

All of that tract or parcel of land lying and being in the 4th District and 4th Section of Floyd County, Georgia, and being a part of Land Lot 127, and being more particularly described as follows: BEGINNING at the point where the North line of Land Lot 127 intersects the West right-of-way line of Lavendar Drive and running thence West along said Land Lot line 1145 feet, more or less to the point where the North right-of-way line of the Southern Railroad intersects said Land Lot line; running thence Easterly following the north right-of-way line of the Southern Railroad to the point where said line intersects the West right-of-way line of Lavendar Drive and running thence North along the West right-of-way line of Lavendar Drive to the point of beginning, and containing 3.4 acres, more or less.

TRACT TWO

All of that tract or parcel of land lying and being in the 4th District and 4th Section of Floyd County, Georgia, and being parts of Land Lots 126 and 127, and more particularly described as follows: BEGINNING at the point where the Spur Track of the Southern Railroad, serving the Rome Frozen Foods property, intersects the East right-of-way line of Lavendar Drive, just South of the North line of Land Lot 127, and running thence Northerly along the present City limit line of the City of Rome to the point where said City limit line intersects the South City limit line of the Trend Mill property, and running thence West approximately 515 feet, more or less, to the East right-of-way line of Lavendar Drive; thence running along said East right-of-way line of Lavendar Drive Southerly to the point of beginning, containing 4.42 acres, more or less, according to a plat of the same in Deed Book 336, page 387 (Rome Foods, Inc.) and (Southern Railroad), of the Deed Records of Floyd County, Georgia.

TRACT THREE

All of that tract or parcel of land lying and being in the 4th District and 4th Section of Floyd County, Georgia, and being parts of Land Lots 127, 128, 125, 161, 124 and 129,

in said District and Section, and BEGINNING at the point where the right-of-way of the Central of Georgia Railroad intersects the East right-of-way line of the Airport Road; and running thence South along the East right-of-way line of the Airport Road, to the point where the same intersects the North right-of-way line of the Southern Railroad right-of-way and running thence along the North right-of-way line of the Southern Railroad, Easterly to the point where the present City limit line intersects the North right-of-way of the Southern Railroad and thence following the present City limit line of the City of Rome, Georgia, to the East right-of-way line of Watson Street; thence running Northerly along the East right-of-way line of Watson Street and Indiana Drive, to the point where the present City limit line intersects the South right-of-way line of the Central of Georgia Railroad; thence following the South right-of-way line of the Central of Georgia Railroad Westerly to the point of beginning.

TRACT FOUR

All of that tract or parcel of land lying and being in the 4th District and 4th Section of Floyd County, Georgia, and being parts of Land Lots 128, and 129 and 161, and being more particularly described as BEGINNING at the intersection of the West right-of-way line of Kirton Street

with the North right-of-way line of Shorter Avenue, and running thence along the West right-of-way line of Kirton Street Northerly to the South right-of-way line of the Southern Railroad and thence following the South right-of-way line of the Southern Railroad Westerly to the intersection of said right-of-way line with the East right-of-way line of the Old Airport Road; thence following the East right-of-way line of the Old Airport Road southerly to the point where it intersects with the North right-of-way line of Shorter Avenue; thence following the North right-of-way line of Shorter Avenue Easterly to the point of beginning.

TRACT FIVE

All of that tract or parcel of land lying and being in the 4th District and 4th Section of Floyd County, Georgia, and being parts of Land Lots 128, 129, 124, 125, 160 and 161, and more particularly described as follows: BEGINNING at a point where the East right-of-way line of the Old Airport Road intersects the North right-of-way line of Shorter Avenue, and running thence Northerly along the East right-of-way line of the Old Airport Road, to the point where it intersects the South right-of-way line of the Central of Georgia Railroad; running thence along the South right-of-way line of the Central of Georgia Railroad, Westerly to the

point where the present City limit line of Rome, Georgia, intersects said South right-of-way line of said Railroad and thence following the present City limit line of the City of Rome, to the North right-of-way line of Shorter Avenue; running thence along the North right-of-way line of Shorter Avenue to the point of beginning.

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Notice of Intention to Introduce Local Legislation. Georgia, Floyd County.

Notice is hereby given that there will be introduced at the 1973 Session of the General Assembly of Georgia, a local Bill to amend the Act creating a new Charter and Municipal government for the City of Rome, approved August 19th, 1918, (Ga. L. 1918, p. 813), as amended, so as to change and extend the Corporate Limits of said City and for other purposes.

This 7th day of February, 1973.

John Adams
Representative,
14th District
Sidney Lowrey
Representative
15th District
Representative,
16th District

Sam Doss
Senator
52nd District

Georgia, Fulton County.

Personally appeared before me, the undersigned authority, duly authorized to administer oaths, John Adams who, on oath, deposes and says that he is Representative from the 14th District, and that the attached copy of Notice of Intention to Introduce Local Legislation was published in the Rome News-Tribune which is the official organ of Floyd County, on the following dates: February 8, 15, 22, 1973.

John Adams
Representative,
14th District

Sworn to and subscribed before me, this 26th day of February, 1973.

/s/ Susan Gordon
Notary Public, Georgia
State at Large
My Commission Expires Dec. 18, 1976.
(Seal).

Approved April 17, 1973.

DEPARTMENT OF JUSTICE
WASHINGTON, DC 20530

Mr. Robert M. Brinson
City Attorney
City of Rome
P.O. Drawer N
Rome, Georgia 30161

Dear Mr. Brinson:

This letter will confirm your telephone conversation of July 19, 1974, with Departmental Attorney Charles Aycock regarding your recent submission of a 1973 annexation to the City of Rome, Georgia. This annexation was submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, and received by this Department on June 15, 1974.

The information you provided to Mr. Aycock by telephone indicated that there have been a number of annexations to the City of Rome since 1964 which have not been submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act. If this information is correct, it is necessary that each of these annexation changes either be brought before the United States District Court for the District of Columbia or submitted to the Attorney General. A change of this nature which affects voting is unenforceable unless and until the Section 5 preclearance requirements have been met.

In order to expedite consideration of this submission a preliminary review of the information you have provided was made and it was determined that in order for you to provide us with a completed submission on the 1973

annexation, it will be necessary for you to provide us with the following information:

1. A map of the City of Rome clearly showing the corporate boundaries prior to the 1973 annexation, the annexed areas, and the population by race within the existing city limits and in the annexed areas.

2. A map or maps showing all past annexations, dates of these annexations, and all proposed annexations since 1964. Also, the populations by race in each one of the annexed areas or proposed annexations.

3. Current development of the 1973 annexed areas and expected future development of these areas.

4. A map of the City of Rome showing the city election wards before the 1973 annexation and the city wards after the annexation.

5. The method of electing all elected city officials, i.e., city commissioners, school board officials, etc. for Rome, and whether any blacks have run for election since 1965.

6. Whether any areas has sought annexation and been denied, and, if so, what areas and why was annexation denied.

The above requested information should be provided for each prior annexation submitted to the Attorney General pursuant to Section 5.

For your information I have enclosed a copy of the procedures for the administration of Section 5 of the Voting Rights Act of 1965. If you have any questions regarding any matters discussed in this letter, and if we may be of other assistance to you, please feel free to telephone Mr. Aycock (202-739-2158), the attorney who has been assigned to this matter.

Sincerely,

/s/
J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

CITY OF ROME
GEORGIA

February 7, 1975

Robert M. Brinson
City Attorney

Mr. J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D.C. 20530

RE: Civil Rights Division - Attorney General submissions - City of Rome Annexations, Inc.

Dear Mr. Pottinger:

I am sorry to have been so long with accumulating the information you desired in connection with the annexations of the City of Rome since 1965. The call from the local FBI Agent was a good reminder to me.

I have enclosed a map of the City of Rome plotting the annexations over that period of time. I have also enclosed a copy of a letter from the City Manager indicating the population in the "Old Airport Community Area".

Still further, if you will refer to the map, the City of Rome is divided into three wards established by the three rivers, the first ward being between the Oostanaula River and the Etowah River, the second ward being between the Etowah River and the Coosa River and the third ward being between the Coosa River and the Oostanaula River. There are nine City Commissioners and six members of the Board of Education, three and two from each ward respectively, but all elected at large over the City.

If you desire further information, please let me know.

Yours very truly,

/s/
Robert M. Brinson

bbo
Enclosure

DEPARTMENT OF JUSTICE
WASHINGTON, DC 20530

Mr. Robert M. Brinson
City Attorney
P.O. Drawer N
Rome, Georgia 30161

Dear Mr. Brinson:

This will confirm your telephone conversation of February 24, 1974, with Departmental attorney Frederick J. McGrath concerning your submission, under Section 5 of the Voting Rights Act of 1965, of sixty annexations to the City of Rome, Georgia. These annexations were received on February 10, 1975, and were submitted in response to a July 24, 1974, communication from this Department in which we requested that all the municipal annexations accomplished since 1964 either be submitted to the Attorney General or to the United States District Court for the District of Columbia.

A review of the material received on February 10th reveals that certain information which we requested in our communication of July 24, 1974, has not, as of this writing, been provided. Accordingly, as was requested in our letter of July 24, 1974, and by Mr. McGrath on February 24, 1975, would you please assist us by providing this Department with the following information:

(1) Population figures, by race, for each of the sixty areas annexed to the City of Rome since 1964. If exact figures are not avail-

able, please forward to this office your best estimates of the population totals involved.

(2) Whether any area has sought annexation and has been denied, and, if so, what area and why was annexation denied.

In addition, would you please provide us with the number of registered voters, by race, for each of the sixty areas annexed to the City of Rome since 1964. I understand that you indicated to Mr. McGrath in your telephone conversation that you may be able to either provide these figures or provide your best estimates of the number of registered voters involved. Apart from the above, we would need any information you might have relative to either the past and/or the projected use of the annexations involved in this submission.

The Attorney General has a 60-day period to consider submissions pursuant to Section 5 of the Voting Rights Act of 1965. This time period will begin to run upon receipt of the additional information necessary to evaluate the annexations referred to above. If you have any questions, please do not hesitate to contact Mr. McGrath, the attorney assigned to handle this submission. His telephone number is 202--739-4489.

Before concluding, I note in your conversation of February 24, 1975, with Mr. McGrath that you indicated that the method of electing members to the City Commission and Board of Education was changed in either 1961 or 1966. Our records fail to show that this

change has been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as is required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973. If the change was made at any time after November 1, 1964, it is necessary that it either be brought before the District Court for the District of Columbia or submitted to the Attorney General. Changes, such as this, which affect voting are unenforceable unless and until the Section 5 preclearance requirements have been met. Accordingly, would you please advise us of the exact date when the method of electing members to the City Commission and the Board of Education was changed and, if such method was changed on or after November 1, 1964, would you please advise us of your intended course of action.

Sincerely,

/s/
J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

CITY OF ROME
GEORGIA

February 5, 1975

Bruce Hamler
City Manager

Mr. Robert M. Brinson
P.O. Box 5513
Rome, Georgia 30161

RE: City of Rome
Annexations, etc.

Dear Bob:

We have checked the number of homes in the Old Airport Community and find that there are 206 homes on our tax digest. We believe an average of about three persons per dwelling would be a fair estimate so that would be a fair estimate so that would indicate about 618 people in the area which was annexed in 1973. There are 297 registered voters in the annexed area. As to how many blacks are in the area, we have checked this out as best we could and find no blacks in the area. This was not a house to house census but a good check of the area.

Sincerely,

CITY OF ROME

/s/
Bruce Hamler
City Manager

BH:fd

CITY OF ROME
GEORGIA

March 14, 1975

Robert M. Brinson
City Attorney

Mr. J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Mr. Fredrick J. McGrath
Departmental Attorney
Department of Justice
Washington, D.C. 20530

RE: City of Rome

Gentlemen:

I have the letter of Mr. Pottinger of March 6, 1975. The personnel of the City is presently undertaking to research and assimilate the desired information and we should be forwarding it to you within the next few weeks.

In the meantime, I am enclosing herewith the City Manager's letter previously referred to but omitted from my letter to the Justice Department of February 7, 1975.

Also in the meantime, it would appear that the change in the Wards of the City of Rome was effected in 1966. Consequently, we apparently will have to submit the change to the Attorney General, and anticipate doing so in connection with all the present undertakings.

We appreciate your continued assistance in this matter.

Yours very truly,

/s/
Robert M. Brinson

RMB/gm
Enclosure
cc: Mr. Bruce Hamler

CITY OF ROME
GEORGIA

May 28, 1975

Robert M. Brinson
City Attorney

Mr. Frederick J. McGrath
Mr. J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division
Voting Section
Department of Justice
550 11th Street, N.W.
Washington, D.C. 20530

RE: City of Rome Compliance
Voting Rights Act

Dear Sirs:

Pursuant to your letter of March 6, 1975, the City of Rome has set about to obtain the additional information you requested.

I have enclosed herewith a composite list of the annexations showing our best estimates of the population figures, by race, for each of the areas, together with the number of registered voters in the areas. The use (zoning) of each area is shown at the far right of the list (R meaning residential, C meaning commercial, O meaning office and M meaning manufacturing).

Two areas sought annexation by the City of Rome, and annexation was not effected. An area of Rome contiguous to the City Limits known as the "Garden Lakes area" held a referendum wherein the vote was against annexation. The owner of a mobile home park petitioned the City Commission for annexation, but the City denied annexation because of the crowded school condition and objections of adjacent property owners.

Rev. Clyde Hill, Sr. ran for the office of School Board member on December 1, 1970. Rev. Hill is a black and was one of two who participated in a run-off election December 15, 1970. Dr. Sara Hoyt received 1,409 votes, Rev. Hill received 1,142 votes. Rev. Hill has since moved away. No other black has offered for the City Commission or the School Board.

The number of wards and the method of electing members to the Rome City Commission and the Rome Board of Education was changed in 1966 by legislative act.

I trust this is the information you require, and if we can be of any further assistance, please let me know.

Yours very truly,

/s/
Robert M. Brinson

bbo
Enclosure

1	45	0	20	Saddle Mountain-DuPre	R1A
2	20	0	10	Holmes Acres-East 11th Extension	R1A
3	20	0	10	Lyons Drive-West Rome-Ala. Road	R1B
4	0	0	0	G.E. Plant & Site	M2
5	5	0	2	Brookwood Estates-Burnett Ferry Rd.	R1A
6	3	0	2	Maplewood-Jack Anderson	R1A
7	3	0	2	East 17th Street-Maurice Gann	R1B
8	4	0	2	Off Saddle Mountain-Jack Busbin	R1B
9	0	0	0	Georgian & Old Salem Apartments	R2C
10	0	0	0	3 lots Lenox Circle-Traylor	R1B
11	8	0	4	East 11th St.-Rogers & Culbreth	R1A
12	0	0	0	Briarcliff Road-Mt. View Annex	R1A
13	45	0	27	Battey Hospital	R1B
14	4	0	2	One lot	R-2

15	3	0	1	Catholic School & Home	R1A
16	0	0	0	Maplewood Square	R1B
17	4	0	2	One lot - Bob Cescutti	R1B
18	12	0	7	Garden Lakes Rolling-wood Area	R1A
19	0	0	0	Commercial (Commerce Park)	C3
20	0	0	0	Berkshire Estates	R1B
21	0	0	0	Darlington Sch. Strip Land, Furnace Rd.	R1A
22	0	0	0	Commercial - Keller Dye Co.	M1
23	3	0	1	Waste Treatment Plant (City)	M2
24	0	0	0	North Heights Elem. School (City)	C2
25	0	0	0	Beakert Steel Co.	M2
26	2	0	2	G.L. Sutton, Black's Bluff Road	R1A
27	5	0	3	1 Lot Atteiram Sub-division	R1A
28	0	0	0	Commercial - Coosa Baking Co.	M1
29	0	0	0	Commercial - Integrated Products	M1
30	0	0	0	Commercial - Southern Wholesale	M2
31	3	0	1	Westwood Sub. Clyde Chester	R1A
32	0	0	0	Fox Mfg. Co. Com-mercial, Old Lindale Rd.	M1
33	0	0	0	Berry Schools Comm., John Maddox Dr.	C1
34	0	0	0	Hosp. Corp. of America Redmond Park Hospital	OI
35	3	0	2	Fellowship Baptist Church	R1
36	0	0	0	Road Strip (Burnett Ferry Road)	C1

37	0	0	0	Strip Road Old Lindale Road	C1
38	0	0	0	Ramada Inn-Chas. Williams & Smith	C1
39	0	0	0	W.A. DuPre-Rockmart Road	C1
40	0	0	0	Westminister Apts., Harry Butler	R2
41	0	0	0	Williamson Street-Chas. Williams	OI
42	1	0	1	End East 11th St.-Billy Towers	R1A
43	0	0	0	Castle Cove Subdivision Area	R2
44	0	0	0	Saddle Mt. #3, Howell & Covington	R1A
45	0	0	0	Oostanaula River Pumping Station (City)	R2
46	0	0	0	V.E. Anderson, Gateway	M1
47	0	0	0	Waste Treatment Plant (City)	M1
48	0	0	0	Turner Frozen Foods, Rockmart Road	C1
49	0	0	0	Commercial Garden Lakes Inds. Blvd.	M1
50	0	0	0	Red Diamond-Alabama Rd.	M1
51	0	0	0	Commercial, East Gate, Dodd Blvd.	C3
52	0	0	0	Saddle Mt. #4, Bill DuPre	R1A
53	927	0	430	Old Airport Community-Legislature	R1B & M1
54	0	0	0	East Gate #2, Hwy. 411 Howell & Covington	C3
55	0	0	0	Maplewood Park-Munchak	R1A
56	0	0	0	Hwy. 411 Woodfin Turner Property	OI

57	0	0	0	Hidden Valley, Howell & Covington	R1B
58	0	0	0	Commercial Coca Cola Co. Barron Corp.	M1
59	0	0	0	Commercial Pharr Yarns, Huffacre Road	M1
60	0	0	0	National City Bank, Martha Berry Blvd.	C1

DEPARTMENT OF JUSTICE
WASHINGTON, DC 20530

August 1, 1975

Mr. Robert M. Brinson
City Attorney
P.O. Drawer N
Rome, Georgia 30161

Dear Mr. Brinson:

This is in reference to the 60 annexations to the City of Rome, Georgia, submitted to the attorney General pursuant to Section 5 of the Voting Rights Act of 1965.

In examining annexations under Section 5 of the Voting Rights Act, it is incumbent on the Attorney General to determine whether the annexations, either in purpose or effect result in racial discrimination in voting. Moreover, under the procedural guidelines for the administration of Section 5, the burden of proving that such discriminatory purpose or effect does not exists lies with the submitting authority. Georgia v. United States, 411 U.S. 526 (1973); City of Richmond v. United States,

43 U.S.L.W. 4865 (June 24, 1975); City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972) aff'd 410 U.S. 962 (1973).

As part of our present examination, our analysis has revealed that during the period of time when these annexations took effect, the manner in which members were elected to the city commission and the city school board was substantially changed. Because these electoral changes are indispensable to an evaluation of the voting effects of these annexations, we are unable to conclude that the annexations under review have no discriminatory effect absent a submission of these changes in the manner of electing commission and school board members. Accordingly, as is provided for in the Section 5 guidelines, 28 C.F.R. 51.19, and consistent with the above-described burden of proof requirements, I must on behalf of the Attorney General interpose an objection to the annexations submitted for review.

With respect to the above, the Attorney General will reconsider his determination, upon receipt of a submission of the changes undertaken in the election of the city commission and the city school board.

Of course, as provided by Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these annexations have neither the purpose nor effect of denying or abridging the right to vote on account of race or color. However, until such a judgment is rendered by that court, or until the objection has been withdrawn by the Attorney General, the legal effect of the objection by the

Attorney General is to render the annexations in question legally unenforceable insofar as they affect voting in the City of Rome.

Sincerely,

/s/
J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

CITY OF ROME
GEORGIA

August 19, 1975

Robert M. Brinson
City Attorney

Mr. J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Pottinger:

Enclosed herein please find the original and one copy of the following documents:

Application by City of Rome, Georgia to the Attorney General of the United States for the Approval of Certain Acts of the General Assembly Passed

to Effect Certain Electoral Changes in City of Rome Elections (Submission under Section 5, Voting Rights Act)

Motion for Reconsideration of Application (Submission under Section 5, Voting Rights Act)

Thank you very much.

Yours very truly,

/s/
Robert M. Brinson

bbo
Enclosures
cc: Mr. Bruce Hamler

APPLICATION BY CITY OF ROME, GEORGIA TO THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE APPROVAL OF CERTAIN ACTS OF THE GENERAL ASSEMBLY PASSED TO EFFECT CERTAIN ELECTORAL CHANGES IN CITY OF ROME ELECTIONS (SUBMISSION UNDER SECTION 5, VOTING RIGHTS ACT)

CITY OF ROME, GEORGIA

BY: /s/
CITY ATTORNEY

Now comes the City of Rome, Georgia by and through its City Attorney and respectfully requests the approval of the Attorney General of the United States of the following electoral changes.

1.

This application and submission is made pursuant to Section 5 of the Voting Rights Act of 1965, Public Law 89-110, August 6, 1965, 42 USC Section 1973C.

2.

The General Assembly of the State of Georgia passed certain Acts in 1966, 1967, 1970 and 1971, which were concerned with the composition of the government of the City of Rome, with the Board of Education of said City and with certain election procedures.

3.

Georgia Laws 1966, pp. 2375-8, a copy of which is attached hereto as Exhibit "A", amended the Charter of the City of Rome, (Ga. Laws 1918, p. 813) to provide for the offices of city commissioners as follows: One commissioner from one of three posts in each of three wards.

4.

Georgia Laws 1966, pp. 2379-82, a copy of which is attached hereto as Exhibit "B", amended the Charter of the City of Rome, (Ga. Laws 1918, pp. 813-885, as amended by Ga. Laws 1929, pp. 1254-1276) to provide for the reduction in the number of wards from Nine (9) to three (3).

5.

Georgia Laws 1966, pp. 2382-2386, a copy of which is attached hereto as Exhibit "C", amended the Charter of the City of Rome, (Ga. Laws 1918, pp. 813-885) to provide for the qualifications and salary of commissioners, for organization of the commission and for election by posts in each of three wards.

6.

Georgia Laws 1966, pp. 3069-3072, a copy of which is attached hereto as Exhibit "D", amended the Charter of the City of Rome, (Ga. Laws 1918, pp. 813-885) to remove restrictions from voter qualifications.

7.

Georgia Laws 1966, pp. 2815-2819, a copy of which is attached hereto as Exhibit "E", amended the Charter of the City of Rome, (Ga. Laws 1918, pp. 813-885) to provide for the city board of education and for the election of members to said board by posts with two posts for each of three wards.

8.

Georgia Laws 1966, pp. 3083-3087, a copy of which is attached hereto as Exhibit "F", amended the Charter of the City of Rome, (Ga. Laws 1918, pp. 813-885) to make provisions for the nomination of candidates in city elections and for the conduct of primaries and elections. This section was entirely superseded by the Georgia Municipal Election Code in 1968.

9.

Georgia Laws 1967, pp. 3296-3298, a copy of which is attached hereto as Exhibit "G" corrected a typographical error in Georgia Laws 1966, pp. 2375-2378.

10.

Georgia Laws 1970, pp. 2563-2566, a copy of which is attached hereto as Exhibit "H", amended the Charter of the City of Rome, (Ga. Laws 1918, pp. 813-885, as amended by Ga. Laws 1966, p. 2375) to change the election date of city commissioner elections and to provide for conduct of run-off elections.

11.

Georgia Laws 1971, pp. 3664-3666, a copy of which is attached hereto as Exhibit "I", amended the Charter of the City of Rome, (Ga. Laws 1966, p. 2815) to change the election date of City Board of Education members and to provide for conduct of run-off elections.

12.

Copies of pertinent sections of Ga. Laws 1918 and of Ga. Laws 1929, hereinbefore referred to, are attached hereto as Exhibits "J" and "K", respectively.

13.

Said electoral changes were effected in an attempt to equalize the representation among commissioners and among members of the City Board of Education and in order to provide continuity of membership through staggered terms of members of those boards.

14.

The changes did not have as their purpose, and will not have the effect, of, denying or abridging the right to vote on account of race, color or otherwise.

15.

This Application was not made sooner because local counsel was unaware of the requirement of submission of laws passed by the State Legislature.

16.

The applicant has no other information or supporting materials to assist the Attorney General in his consideration, but will endeavor to furnish material or information requested.

Respectfully submitted,

THE CITY OF ROME, GEORGIA

BY: /s/
ROBERT M. BRINSON
CITY ATTORNEY

P.O. Box 5513
Rome, Georgia 30161
(404) 234-0853

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

October 20, 1975

Mr. Robert M. Brinson
City Attorney
P.O. Drawer N
Rome, Georgia 30161

Dear Mr. Brinson:

This is in reference to your request that this Department reconsider its August 1, 1975, objection under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to sixty annexations to the City of Rome and your submission to the Attorney General of those changes in the manner in which individuals are elected to the City Commission and the Board of Education which have taken place since November 1, 1964. Your request for reconsideration and your submission of the municipal electoral changes were both received on August 21, 1975.

As I indicated in my letter of August 1, 1975, an examination of the changes which have been made in the manner of electing city commission and school board members is indispensable to an evaluation of voting effects of the annexations in question. We therefore find it appropriate to review those electoral changes before revisiting the annexation issues.

We have given careful consideration to the information supplied as well as the data compiled by the Bureau of the Census and information and comments from interested parties. In addition we have considered the infor-

mation and data which you previously provided this office in connection with your earlier submission of sixty municipal annexations. After a careful examination of all the facts available to us and an analysis of recent court decisions, we are unable to conclude, as we must under the Voting Rights Act, that the imposition of the majority-vote requirement, numbered posts, and staggered terms for commissioner and board of education elections and the residency requirement for board of education elections will not have a racially discriminatory effect in the context of the at-large elections that presently exist.

Recent Supreme Court decisions, to which we feel obligated to give great weight, indicate that the combination of the above features would have the effect of abridging minority voting rights in the City of Rome. The reasoning of these recent cases is illustrated by the Supreme Court's decision in June of 1973 which held that a multi-member election system, numerical posts and majority vote requirement of Dallas and Bexar Counties, Texas, tended to abridge minority voting power in contravention of the constitution. White v. Regester, 412 U.S. 755 (1973). See also, Whitcomb v. Chavis, 403 U.S. 124 (1971). That these features have a deleterious effect on the right of blacks in Rome, a majority white city, to elect a candidate of their choice is illustrated to some extent by the situation in 1970 when, according to our information, a black candidate for school board received the highest vote among 4 candidates in the primary but lost to a white opponent in the run-off.

On behalf of the Attorney General, therefore, I must interpose an objection to the imposition of the majority vote requirement, numbered posts, and staggered terms in commissioner and school board elections and the imposition of a residency requirement in board of education elections.

We turn now to a reconsideration of the sixty annexations to which an objection was interposed previously. As indicated at the time of that objection, it is the Attorney General's responsibility in examining annexations under Section 5 to determine whether the annexations, either in purpose or effect, result in racial discrimination in voting. In making this evaluation we apply the legal principles which the courts have developed in the same or analogous situations. Since Section 5 only relates to changes affecting voting our proper concern is not with the validity of the annexations as such but with the changes in voting which flow from them.

With this understanding of the Attorney General's role under Section 5 in mind, I can advise you that the Attorney General will withdraw the objection previously interposed to 47 of the annexations submitted.[1] Our analysis reveals that these 47 annexations involve either areas that are not populated or areas that

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[1] Those annexations which, according to your letter dated May 28, 1975, bear parcel numbers 4, 5, 6, 7, 8, 10, 11, 12, 14, 15, 17, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 54, 55, 56, 57, 58, 59, and 60.

populations of which would have a most a de minimus effect on minority voting strength.

With regard to the other 13 annexations we cannot reach a like conclusion.[2] We have carefully examined these annexations in light of the information initially provided, the electoral changes which have been submitted and federal court decisions which have involved questions of the racially dilutive effect of annexations where political subdivisions conduct elections on an at-large basis. City of Richmond v. United States, 43 U.S.L.W. 4865 (June 24, 1975); City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972) aff'd 410 U.S. 962 (1973). According to the data received, virtually all of the individuals residing in the annexed areas are white. Our information regarding elections in Rome demonstrates that the city elects its commission and education officials on an at-large basis and that racial bloc voting exists generally. In addition, the City has sought to add to its election system the majority vote requirement and other features found here earlier to be objectionable by the Attorney General.

Under these circumstances, and commensurate with the decisions cited above, we cannot conclude that the 13 annexations in question do not have a racially dilutive effect on voting in Rome. Accordingly, the objection interposed on August 1, 1975, to these 13 annexations will not be withdrawn. In this connection, however, should the city undertake again to elect its councilmen and board of education members by a simple plurality - win

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[2] Those annexations which, according to your 1, 2, 3, 9, 13, 16, 18, 20, 39, 40, 43, 52 and 53.

system, which does not incorporate the limiting features herein objected to, or from fairly drawn single-member districts the Attorney General will again reconsider his determination of this matter.

Of course, Section 5 permits seeking approval of all changes affecting voting by the United States District Court for the District of Columbia irrespective of whether the changes have been objected to previously by the Attorney General.

Sincerely,

/s/
J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

CITY OF ROME
GEORGIA

May 21, 1976

Robert M. Brinson
City Attorney

U. S. Attorney General
Department of Justice
Washington, D.C.

RE: City of Rome, Georgia

Dear Sir:

I am handing you herewith an application for reconsideration of the prior submissions of the City of Rome under Section 5 of the Voting Rights Act.

As I have discussed with Mr. McGrath, in view of the City's contention that the Act is void and not applicable to it, the Rome City Commission is compelled to proceed with its scheduled primaries and elections as required by State law, and is now doing so.

Respectfully submitted,

CITY OF ROME, GEORGIA

BY: /s/
ITS ATTORNEY

APPLICATION BY THE CITY OF ROME, GEORGIA, TO THE ATTORNEY GENERAL OF THE UNITED STATES FOR RECONSIDERATION OF HIS OBJECTION (UNDER SECTION 5 OF THE VOTING RIGHTS ACT, 42 U.S.C. 1973c) TO SUBMISSIONS BY SAID CITY OF ELECTION PROCEDURE CHANGES AND ANNEXATIONS

CITY OF ROME, GEORGIA

BY: /s/
ITS ATTORNEY

Now comes the City of Rome, Georgia (hereinafter referred to as "the City"), by and through its City Attorney and respectfully requests that the Attorney General of the United States reconsider his objection (hereinafter referred to as "the objection") to submissions (hereinafter referred to as "the submissions") by said City under Section 5 of the Voting Rights Act, which objection was dated October 20, 1975, and shows:

1.

The City has made submissions earlier, and makes this application, all without waiving but specifically reserving its contention that the Voting Rights Act of 1965 is void in that it violates the Constitution of the United States, on at least the following grounds:

(a) It fails to guarantee to the State of Georgia, the City of Rome and the citizens thereof, a republican form of government;

(b) It deprives the State of Georgia, the City of Rome and the citizens thereof of life, liberty and property without due process of law;

(c) It denies or abridges the right of the citizens of the City of Rome to vote on account of race and color.

2.

The City hereby incorporates and adopts the contents of all its previous submissions (except those pertaining to the 47 annexations not objected to; as noted in the objection, page 3) into this application for reconsideration.

3.

Within the City of Rome, the seats on the Rome City Commission and on the Rome Board of Education were at large long before November, 1964.

4.

The electoral changes and annexations described in the submissions did not have as their purpose, and do not have the effect, of denying or abridging the right to vote on account of race, color or otherwise.

5.

The City of Rome should not be affected by Section 5 of the Voting Rights Act for at least the following reasons:

(a) The Act is unconstitutional and void as hereinbefore set out;

(b) The City of Rome is not subject to the provisions of Section 5 in that no determinations specified in Section 4 have been made with reference to the City as a political subdivision;

(c) No "test or device" as defined in Section 4 of the Voting Rights Act has been used within the City of Rome for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or otherwise for at least 12 years prior to the filing of this application.

6.

The electoral changes and annexations should not be rejected under Section 5 for the reasons that:

(a) There is no history nor present existence of bloc-voting by race within the City of Rome, as evidenced by the affidavits attached hereto;

(b) Said changes and annexations did not cause, and will not lead to, a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.

7.

The objection, and the requirements set forth therein, to-wit, the drawing of single member districts, are erroneous for at least the following reasons:

(a) The objection addresses itself to the procedures presently obtaining in the City and not only to the changes after November, 1964, as it is required to do;

(b) The objection makes a constitutional determination rather than one of statutory construction;

(c) The objection finds only the potential effect, and not purpose, of denying or abridging the right to vote, and such finding is insufficient to deny preclearance;

(d) The objection is not based upon a finding of retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise, as it is required to be;

(e) Any effect of abridgement would not be so substantial as to be preventable under any plan;

(f) The requirement of redistricting is unconstitutional in that it would constitute a racial gerrymandering contrary to the Equal Protection Clause;

(g) The requirement of redistricting would be counter-productive to the command of the Equal Protection Clause that racial lines be eliminated rather than created;

(h) Redistricting to assure the election of a racial proportion of representatives denies the citizens of Rome the constitutional right to be considered on their merits.

8.

The City of Rome respectfully requests that the Attorney General address itself and respond to each of the issues raised above, especially in light of the decision in Beer v. United States, 44 LW 4435, and that he find and interpose no objection to the submissions.

Respectfully submitted,

CITY OF ROME

BY: /s/
ITS ATTORNEY

AFFADAVIT IN RE: THE APPLICATION OF THE CITY OF ROME FOR RECONSIDERATION OF PREVIOUS SUBMISSIONS UNDER SECTION 5 OF THE VOTING RIGHTS ACT

GEORGIA, FLOYD COUNTY:

Personally appeared before the undersigned official duly authorized to administer oaths, T. DEAN JOHNSON, who after first being duly sworn, says on oath that the following facts are true:

That he is presently and has been for 11 years Chief Voter Registrar of Floyd County, Georgia, and has been involved in the election affairs of said County and the City of Rome for that period;

That, in said capacity, he has been keenly aware of elections and the election processes and trends in said City;

That, in said capacity, he has frequent occasions to consult and converse with members of both the black and the white race regarding City and election matters;

That, in his opinion as a long-time observer of City affairs and City elections and as a communicant with members of both races concerning election matters, the voters of the City of Rome vote according to their convictions, independent of race, and there is no history nor present existence of bloc-voting by race within the City of Rome.

/s/
T. DEAN JOHNSON

Sworn to and subscribed
before me this 21st day
of May, 1976.

/s/
NOTARY PUBLIC, FLOYD
COUNTY, GEORGIA

AFFADAVIT IN RE: THE APPLICATION OF THE CITY OF ROME FOR RECONSIDERATION OF PREVIOUS SUBMISSIONS UNDER SECTION 5 OF THE VOTING RIGHTS ACT

Georgia, Floyd County:

Personally appeared before the undersigned official duly authorized to administer oaths, HARRY JOHNSON, JR., who, after first being duly sworn, says on oath that the following facts are true:

That he is presently Probate Judge of Floyd County, Georgia and Municipal Election Superintendent of the City of Rome, Georgia, and has been involved in the elections of said County for 20 years and the elections of said City for 6 years;

That, in said capacity, he has been keenly aware of elections and the election processes and trends in said City;

That, in said capacity, he has frequent occasions to consult and converse with members of both the black and the white race regarding City and election matters;

That, in his opinion as a long-time official in local elections and as a communicant with members of both races concerning election matters, the voters of the City of Rome vote according to their convictions and according to the individual candidate, independent of race and there is no history nor present existence of bloc-voting by race within the City of Rome.

/s/
HARRY JOHNSON, JR.

Sworn to and subscribed
before me this 21st day
of May, 1976.

/s/
NOTARY PUBLIC

AFFADAVIT IN RE: THE APPLICATION OF THE CITY OF ROME FOR RECONSIDERATION OF PREVIOUS SUBMISSIONS UNDER SECTION 5 OF THE VOTING RIGHTS ACT

Georgia, Floyd County:

Personally appeared before the undersigned official duly authorized to administer oaths, H. F. HUNTER, JR., who, after first being duly sworn, says on oath that the following facts are true:

That he is a present Commissioner of the City of Rome, Georgia and has been involved in the government and affairs of said City for 7+ years;

That, prior to and in said capacity, he has been keenly aware of elections and the election processes and trends and has campaigned for election in said City;

That, in said capacity, he has frequent occasion to consult and converse with members of both the black and the white race regarding City and election matters;

That, in his opinion as a long-time observer of City affairs and City elections and as a communicant with members of both races concerning election matters, the voters of the City of Rome vote according to their convictions and the individual candidate independent of race and there is no history nor present existence of bloc-voting by race within the City of Rome.

/s/
H. F. HUNTER, JR.

Sworn to and subscribed
before me this 21st day
of May, 1976.

/s/
NOTARY PUBLIC

AFFIDAVIT IN RE: THE APPLICATION OF THE CITY OF ROME FOR RECONSIDERATION OF PREVIOUS SUBMISSIONS UNDER SECTION 5 OF THE VOTING RIGHTS ACT

GEORGIA, FLOYD COUNTY:

Personally appeared before the undersigned official duly authorized to administer oaths, Bruce Hamler, who, after first being duly sworn, says on oath that the following facts are true:

That he is presently City Manager of the City of Rome, Georgia, and has been involved in the government and affairs of said City for 36 years;

That, in said capacity, he has been keenly aware of elections and the election processes and trends in said City;

That, in said capacity, he has frequent occasions to consult and converse with members of both the black and the white race regarding City and election matters;

That, in his opinion as a long-time observer of City affairs and the City elections and as a communicant with members of both races concerning election matters, the voters of the City of Rome vote according to their convictions independent of race and there is no history nor present existence of bloc-voting by race within the City of Rome.

/s/
BRUCE HAMLER

Sworn to and subscribed
before me this 21st day
of May, 1976.

/s/
NOTARY PUBLIC, FLOYD
COUNTY, GEORGIA

May 25, 1976

Mr. Robert M. Brinson
City Attorney
P. O. Box Drawer K.
Rome, Georgia 30101

Dear Mr. Brinson:

This will acknowledge receipt on May 24, 1976, of your request that the Department reconsider the objections that have been pre-

viously interposed under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, to 13 municipal annexations and to the imposition of a majority vote requirement, numbered posts, and staggered terms in commissioner and school board elections as well as the imposition of a residency requirement in board of education elections.

Sincerely,

J. STANLEY POTTINGER
Assistant Attorney General
Civil Rights Division

BY:

DAVID H. HUNTER
Attorney, Voting
Section

CITY OF ROME
GEORGIA

ROBERT M. BRINSON
CITY ATTORNEY

July 13, 1976

Mr. J. Stanley Pottinger
Mr. Fred McGrath
Department of Justice
Washington, D.C. 20530

RE: City of Rome, Georgia

Gentlemen:

I am enclosing herewith two additional affidavits in re the application of the City of Rome for reconsideration of previous submissions under Section V of the Voting Rights Act. I am hereby requesting that these affidavits be included as exhibits to our now pending application for reconsideration and considered in your determination.

Thank you very much.

Yours very truly,

/s/
Robert M. Brinson

bbo
Enclosures
cc: Mr. Bruce Hamler

AFFIDAVIT IN RE: THE APPLICATION OF THE CITY OF ROME FOR RECONSIDERATION OF PREVIOUS SUBMISSIONS UNDER SECTION 5 OF THE VOTING RIGHTS ACT

GEORGIA, FLOYD COUNTY:

Personally appeared before the undersigned official duly authorized to administer oaths, Sara T. Hixon, who, after first being duly sworn, says on oath that the following facts are true:

That she has been involved in community affairs and elections for 40 years and has voted in City elections for 40 years.

That, in her opinion as a long-time voter and observer of City affairs and City elections, the black voters of the City of Rome vote according to their convictions, independent of race and there is no history nor present existence of bloc-voting by race within the City of Rome.

/s/
Sara T. Hixon

Sworn to and subscribed
before me this 7th day
of July, 1976.

/s/
NOTARY PUBLIC, FLOYD COUNTY, GEORGIA My Commission Expires October 25, 1978

AFFIDAVIT IN RE: THE APPLICATION OF THE CITY OF ROME FOR RECONSIDERATION OF PREVIOUS SUBMISSIONS UNDER SECTION 5 OF THE VOTING RIGHTS ACT

GEORGIA, FLOYD COUNTY:

Personally appeared before the undersigned official duly authorized to administer oaths, David Braziel Jr. who, after first being duly sworn, says on oath that the following facts are true:

That he is a member of the black race and a citizen of the City of Rome, Georgia;

That he has been involved in community affairs and elections for 12 years and has voted in City elections for 12 years.

That, in his opinion as a long-time voter and observer of City affairs and City elections, the black voters of the City of Rome vote according to their convictions, independent of race and there is no history nor present existence of bloc-voting by race within the City of Rome.

/s/
David Braziel, Jr.

Sworn to the subscribed
before me this 6th day
of July, 1976.

/s/
NOTARY PUBLIC, FLOYD COUNTY, GEORGIA My Commission Expires October 25, 1978

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

August 12, 1976

Mr. Robert M. Brinson
City Attorney
City of Rome
P. O. Drawer N
Rome, Georgia 30161

Dear Mr. Brinson:

This is in reference to your request that the Attorney General reconsider the October 20, 1975, decision not to withdraw the objection under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to 13 of the 60 annexations originally submitted June 2, 1975, and the objection of October 20, 1975, to changes in the manner in which individuals are elected to the City Commission and the Board of Education. Your request for reconsideration was received on May 24, 1976, and further information sup-

plementing the request was received on July 14, 1976.

After careful analysis of the request for reconsideration, including consideration of the affidavits submitted and the recent Supreme Court decision in Beer v. United States, ____ U.S. ____, 49 U.S.L.W. 4435 (March 30, 1976), we do not perceive a basis for the Attorney General to withdraw his objection to the changes in the manner in which individuals are elected to the City Commission and the Board of Education. While we have taken full note of the statements you submitted to the effect that racial bloc-voting does not exist in the City of Rome, representations made to us by members of the black community in Rome are to the contrary and this is supported to some extent by the limited information we previously had with regard to the 1970 primary election results (see my letter of October 20, 1975). Accordingly, the Attorney General will decline to withdraw the objection to the imposition of the majority vote requirement, numbered posts, and staggered terms in City Commission and Board of Education elections and the residency requirement in Board of Education elections.

With respect to the objection to the 13 annexations, we are mindful of the suggestion in my October 20, 1975, letter that the Attorney General would reconsider his determination should the city, inter alia, undertake again to elect its councilmen and Board of Education members by a simple plurality - win system which does not incorporate the limiting features objected to therein. Since the continued objection to those features renders the majority vote requirement, numbered posts and residency

requirement for Board of Education elections legally unenforceable the necessary effect of that objection is a reversion to the previously existing simple plurality - win system. In view of that circumstance, therefore, the Attorney General withdraws his objection to the 13 annexations insofar as Board of Education elections are concerned.

We cannot, however, reach a similar conclusion relative to City Commission elections. The pre-existing residency requirement for commission elections (which the Attorney General's objection does not reach because it did not constitute a change) prevents that electoral system from being a simple plurality - win system. Consequently, in view of the limiting residency feature in the context of at-large voting and indications that racial bloc-voting exists, the Attorney General is unable to withdraw his objection to the 13 annexations insofar as City Commission elections are concerned.

I note in your letter of May 21, 1976, the statement that the City is compelled to proceed with its scheduled primaries and elections. It is my understanding, however, that no one has qualified for either the Rome City Commission or the Rome School Board and that the scheduled August elections for these two bodies have been postponed. Accordingly, would you please advise me as soon as possible whether this understanding is correct and, if not, what steps you intend to take with respect to any primaries or elections in the City of Rome.

Sincerely,

/s/
J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

****

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(TITLE OMITTED)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF PLAINTIFF CITY OF ROME AND ITS OFFICIALS FOR PARTIAL SUMMARY JUDGMENT

Filed May 8, 1978

> As the Attorney General pointed out during hearings on the Act...., an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past [seventeen] years, and then to refute whatever evidence to the contrary may be adduced by the Federal Government.

This Court discussed this standard in Virginia v. United States, 386 F. Supp. 1319 (D.D.C. 1974), aff'd per curiam, 420 U.S. 901 (1975), and found that an "exhaustive canvass of registrars...plus a good faith attempt to solicit information from black leaders" met "the affidavit requirement" of Katzenbach 386 F. Supp. at 1321.

The City of Rome has conducted such an exhaustive canvass, the view of ten black leaders are set forth in the record and summarized below, and no "evidence to the contrary" has been adduced by the United States. The evidence in support of Count II was developed through ten depositions taken by the Defendants and the eighteen affidavits of all of the City officials who have been charged with responsibility for voter registration and the conduct of elections for the past forty years. The United States has admitted in response to Plaintiffs' discovery requests that it has no contrary evidence.

Mr. Elgin Carmichael, a black registered voter, testified that he registered 30 years ago at the age of 21. Carmichael Deposition at page 21. Mr. Donald Jackson, who is chairman of the local Voter Education Project Committee, and who also served on the Democratic Executive Committee and the City Traffic Committee, testified that he registered to vote in 1960, when he came to the City of Rome, and encountered no difficulty. Jackson Deposition at page 10. Mr. Edwin Tanner, another black voter, testified that it was close to 30 years ago that he registered and that he did not encounter any difficulties at that time. Tanner

Deposition at pages 12-13. Mr. C. W. Aycock, who serves as Director of Student Financial Aid of Berry College, testified that he probably registered when he was 21 years of age, which would have been in 1930. Aycock Deposition at page 7. He further testified that black citizens of the City of Rome have had no problems with registering for at least the past 20 years, that registration has been actively sought and encouraged for the last 15 years by blacks and whites, and that generally there has been no problem with voting by black citizens. Id. at page 45.

Mr. James Wright, a representative of the Voter Registration Project, testified that he registered to vote at the age of 18, in 1950. Wright Deposition at page 22. He testified that blacks have never had a problem with registration in the City of Rome and that the Voter Registration Project has registered about 4,000 black voters, a record number. He further indicated that the Voter Registration Project has conducted successful registration drives in the City of Rome. Id. at pages 7, 23, and 29, and 49.

Mr. John W. Houser, another black voter, testified that he doesn't remember exactly when he first registered to vote, but "it has been so long I really don't recall details." Houser Deposition at page 8. Mr. E. J. Thoma s testified that he registered in 1967 toward the end of his high school year at the age of 18. His registration took place through a program in which registrars came to the schools to register students. Thomas Deposition at pages 16-17. Mr. Curtis Moreland testified that blacks have never had any trouble registering

to vote and that registration has been encouraged by the city officials. Moreland Deposition at pages 48-49. Mr. Napolean Fielder, himself a voter registrar and a black, indicated that no one has ever hindered his efforts, as a registrar, to get blacks registered. Fielder Deposition at page 41. Finally, Mr. Joe Wright testified that blacks have never been hindered in any way from registering and never encountered any obstacles to registering or voting. Wright Deposition at pages 42-43, 48.

Mrs. Ray Beard, who served as city registrar (Secretary of the City Commission) until the City of Rome transferred the responsibility for the registration of voters, swore in her affidavits that neither she, nor her staff, has ever required any person to take a test or an oath before registering. She affirmatively indicated in one of her affidavits that she and her staff have registered persons, black and white, who could not write. Affidavits in Support of Plaintiffs' Motion for Summary Judgment of Mrs. Ray Beard. Mrs. Helen Dowdy, who worked under the supervision of Mrs. Beard, testified that neither she nor any other employee of the office of the Secretary of the Commission ever required any person to take a test before registering. She and other employees have registered persons, black and white, who could not write. Affidavit in Support of Plaintiffs' Motion for Summary Judgment of Mrs. Helen Dowdy.

Plaintiff, Bruce Hamler, Rome City Manager, testified that over the years citizens who could not write have been allowed to register by making a mark. Hamler Deposition at page 18. He further stated that citizens who

could not read were nevertheless allowed to vote. Id. at pages 128-130. Corroborative of this point, Mr. Moreland stated that when he registered, approximately in the early 1960's, he did not have to prove that he could read or write. Moreland Deposition at page 54. Mr. Fielder also indicated that he does not remember having to take any test to register. He just went in and signed his name. Fielder Deposition at pages 69-71. Mr. Tanner stated that when he first registered "close to 30 years ago", he believed that a literacy test was imposed; however, he testified that in more recent times procedures are simplified and there is nothing that people have to read. Tanner Deposition at page 12.

The evidence offered by Plaintiffs, including the additional affidavits, could not be clearer. Mrs. Ray Beard's affidavits state directly that neither she nor her staff ever refused to register any person, black or white, except for the reason of non-residency. Affidavits in Support of Plaintiffs' Motion for Summary Judgment of Mrs. Ray Beard. Mrs. Dowdy's affidavit is to the same effect. Affidavit in Support of Plaintiffs' Motion for Summary Judgment of Mrs. Ray Beard. Mrs. Dowdy's affidavit is to the same effect. Affidavit in Support of Plaintiffs' Motion for Summary Judgment of Mrs. Helen Dowdy. Mr. Horace Clary, former City Attorney, stated in his deposition, quite directly, that no one has ever been denied the right to register for a city election. Clary Deposition at pages 34-36.

With respect to the indication of this court in Virginia v. United States, supra, that good faith attempts to solicit information from

black leaders is also necessary in order to meet the Katzenbach affidavit requirement, the depositions of Plaintiff H. F. Hunter, Jr., Mr. Leon Wade, Plaintiff Bruce Hamler, Mr. Horace Clary, and Mr. David Harvey, all of whom have been city officials, clearly indicate many instances in which successful efforts to solicit views of black leaders have been made. See, e.g., Wade Deposition at pages 22-25; Clary Deposition at pages 87-88; Harvey Deposition at pages 18-20. However, more startling in this regard is the testimony of black leaders themselves.

Mr. Fielder indicated that the current Commissioners do the best they can to represent the black community. Fielder Deposition at page 73. Mr. Houser indicated that the current Commission and Rome Board of Education are responsive to the community as a whole, black as well as white. Houser Deposition at pages 11-12. Mr. Carmichael stated that the Commissioners do not ignore the Rome black community, that they are interested and have good intentions. Carmichael Deposition at page 24.

It is interesting that each of the black leaders testified that four different members of the Commission were the "most responsive" to the needs of the black community. Mr. Moreland also indicated that he, as school principal, has enjoyed extreme responsiveness. For example, when there was a fire at the school several years ago, cooperation on the part of the City was "the ultimate." Moreland Deposition at pages 39-21.

The foregoing evidence satisfies the Katzenbach "affidavit requirement" as construed

by this Court in Virginia v. United States. The responses of the United States to the discovery requests of the City of Rome satisfy the second prong of the relevant test.

The Defendants have admitted that they have not made a finding with respect to, nor do they have any evidence of, barriers to black registration with respect to time and place of registration, registration personnel, purging, or re-registration; nor have they made a finding, nor do they have any evidence, of barriers to black voting, with respect to denying minorities the ballot, polling places, including location and adequacy, election officials, inadequate bilingual information and materials, problems of illiterate voters, or absentee voting; nor have they made a finding, nor do they have any evidence, of barriers to black candidacy with respect to filing fees, obstacles to qualifying, campaigning, access to voters at polling places, poll watchers, counting the vote, or problems of independent or third party candidates. Defendants' Responses to Plaintiffs' Second Interrogatories, Responses Nos. 12 and 13. Defendants have responded that no incident of harrassment, intimidation, or violence with respect to registration or voting in the City of Rome has been reported to the Office of the Attorney General. Defendants' Response to Plaintiffs' Second Request for Admission of Facts and Genuineness of Documents, Responses Nos. 3 and 4. Defendants have admitted that they have no evidence of lack of minority access to the process of slating candidates for the City Commission or Board of Education. Defendants' Responses to Plaintiffs' Third Interrogatories, Responses Nos. 4(a), 4(b) and 31.

Finally, Defendants have admitted that they do not even make a contention that any of the following exists in the City of Rome: barriers to black registration, with respect to time and place of registration, registration personnel, purging and re-registration; barriers to black voting with respect to denying minorities the ballot, polling places, including location and adequacy, election officials, and inadequate bilingual information and materials, problems of illiterate voters, and absentee voting; barriers to black candidacy, with respect to filing fees, obstacles to multi-racial and multi-ethnic policies, problems of independent and third party candidates, and minimizing the impact of minority success; and/or physical and economic subordination of black citizens. Id. at Response No. 32.

Indeed, unless the United States changes its position taken in the discovery responses filed thus far, it appears that no substantial dispute exists between Plaintiffs and Defendants as to the factual merits of Plaintiffs' claim to bailout. In such a case as this, the Attorney General is required by the terms of Section 4(a) itself to consent to the entry of the judgment of this Court allowing a jurisdiction to "bailout"; however, the United States has previously taken the position in this case the "[s]ince the entire State of Georgia is subject to the Act's special provisions,...only the state has authority to pursue...a bailout and an individual subjurisdiction of the state is not entitled to such relief." Memorandum in Support of Defendants' Motion to Dismiss at page 5. See also Hearing Before the United States District Court for the District of Columbia on October 28, 1977 at pages 19-20.

In Plaintiffs' First Request for Admission of Facts and Genuineness of Documents, Defendants were asked to admit that "enactment of laws is an integral and traditional function of state and local government." Defendants admitted this request. Defendants' Response to Plaintiffs' First Request for Admission of Facts and Genuineness of Documents, Response No. 42. Defendants were then asked to admit that the enactment of laws is an integral and traditional function of the City of Rome, Georgia. Similarly, Defendants admitted this request. Id. at Response No. 43. Defendants were then asked to admit that "the conduct of elections is an integral and traditional function of state and local government." Defendants admitted this request. Id. at Response No. 44. Finally, Defendants were asked to admit and did admit that the "conduct of elections is an integral and traditional function of the City of Rome, Georgia." Id. at Response No. 45. The Supreme Court has held this to be true as a matter of law:

> No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution... the nature of their own machinery for filling local public offices. Oregon v. Mitchell, 400 U.S. 112, 125 (1970).

In the Affidavit in Support of Plaintiffs' Motion for Summary Judgment of Attorney John M. Nanos, a member of the firm that serves as co-counsel in the present case, Mr. Nanos, who is actively engaged in municipal

bond work, indicates that the existence of a threat of litigation that would bring into question the power of municipal officials to adopt ordinances providing for the issuance of bonds and to execute the bonds so authorized would result in a municipality's bonds either being unmarketable or being sold at an interest rate far in excess of that which the bonds will bear, if bonds counsel's opinion were not qualified in this respect. Thus, the threat of Section 5 litigation, such as Plaintiffs allege to have been made by the Department of Justice in the present case, directly impacts upon the "integral governmental functions" of raising revenue through the issuance of debt instruments and being thus able to carry on and expand municipal services. Indeed, it is well known that the ability to issue municipal debt is critical to the conduct of traditional and integral governmental functions.

Plaintiffs make no quarrel in any part of this motion with the other remedial portions of the Voting Rights Act of 1965 or its goal of realizing the rights guaranteed by the Fifteenth Amendment. Indeed, these are the rights which the citizens of the City of Rome, Georgia wish to exercise. However, the functions of Section 5 go far beyond any point that is necessary or even effective in realizing the goals of the Fifteenth Amendment.

The City of Rome is one of 512 (as of 1967) municipalities in Georgia. It is one of 1244 (as of 1972) local governments in Georgia. Second Supplement to Parties' First Stipulation of Facts, Exh. 46. The State of Texas is subject to Section 5. It has more than 4,000

political subdivisions. Second Request by Plaintiffs for Admission of Facts and Genuineness of Documents, Exhibit "B", at page 151. As of October 31, 1975, the following states were subject to Section 5: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia. In addition, the following have been separately designated: four counties in California, one county in Colorado, three towns in Connecticut, three counties in Florida, one county in Hawaii, one county in Idaho, 18 towns in Maine, nine towns in Massachusetts, ten towns in New Hampshire, three counties in New York, 40 counties in North Carolina and one county in Wyoming. Since the decision of Sheffield, supra, we know that all counties, towns and "minor, local governmental units" within each of the covered states are also covered.

Extrapolation from the above indicated computation obviously results in a very large number. This number must be multiplied by the submissions from each unit. The resulting product must be multiplied by the number of electoral changes, and the product is overwhelming, yet this is the present status of the administration of Section 5.

The Index of Section 5 Submissions as of 2/28/78 By Location and Date, filed by Defendants as Attachment A to Defendants' Response to Plaintiffs' Third Interrogatories, is a 1 1/4-inch (by actual measurement) thick sheaf of 356 computer print-out pages, with an average of 66 changes to the page.

As of March 31, 1978, there had been 21,438 changes submitted to the United States

Attorney General. Approximately 17,000 of those were submissions of only the last three years. Notwithstanding the mountain of paperwork and the gigantic bureaucratic machine engorging it, very little is being disgorged.

As of December 31, 1977, there were only 302 total objections. Upon the assumption that the total changes between December 31, 1977, and March 31, 1978 had not drastically changed, the objection rate is some 1.408%.

The State of Texas computed that one year's compliance with the Voting Rights Act "cost Texas' taxpayers at least $190,000 and required more than 35,000 manhours." Second Request by Plaintiffs for Admission of Facts and Genuineness of Documents, Exhibit "B". Other figures with respect to specific covered jurisdictions are both unavailable and beyond Plaintiffs' means of acquiring; however, in the continuing extrapolation, the total cost to the covered jurisdictions in time and money is staggering.

This constitutional overbreadth would not have been apparent to the Court in 1966, but is now demonstrable. The tests of constitutional latitude in the Tenth Amendment context were suggested by Mr. Justice Rehnquist in National League of Cities. In overruling Maryland v. Wirtz, but sustaining Fry, it was noted that in the latter opinion the "means selected were carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time." 96 S.Ct. at 2474-2475. In the face of the statistics which have been stipulated by Defendants in the present case, it cannot possibly be said that the means selected allegedly to enforce the rights guaranteed by

the Fifteenth Amendment were carefully drafted so as not to interfere with the States' freedom to conduct its elections and enact its laws.[10] The Attorney General's own statistics suggest the absurdity of the Section 5 remedy. The Attorney General has only determined that he "cannot make up his mind" in a very few instances, and yet every municipality in every covered state is made to endure the expense and frustration of the Section 5 process.

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10 By indicating that states' rights deserve the same constitutional protection as individual rights protected by the First, Fifth, and Sixth Amendments, Mr. Justice Rehnquist would undoubtedly require strict judicial scrutiny of federal legislation which intrudes into the exercise of those rights. Such strict scrutiny is traditional in the areas of individual freedoms; and necessarily includes a determination of whether the federal purposes could be achieved as effectively by less drastic means. In the present context, such means could include letters, surveys, "follow-ups," reviews of states session laws, systematic notifications, FBI investigations, and even lawsuits, as, in fact, the Justice Department has precisely instituted. Hearings, infra at pages 170, 301-302. Plaintiffs have attempted to develop information concerning alternative means available to the Justice Department, but Defendants' objections to Plaintiffs' discovery in this area have been sustained by the Court.

Careful examination of the Administrative preclearance route under this "limited and specific" test of Usery-Fry provides another indication that Section 5 is unconstitutional. Submission to the Attorney General has proven to be contrary to the assertion that such provisions gives "covered State(s) a rapid method of rendering a new state election law enforceable." Allen V. State Board of Elections, 393 U.S. at 549. The purported time frame is sixty days, the period within which the Attorney General must act (both by the terms of Section 5 and the Attorney General's own regulations). "Catch 22's,"" however, abound: the sixty days does not begin until the Justice Department has received a "complete" submission, and "completeness" is wholly in the Depart ment's unreviewable discretion; the sixty days does not begin until the submission is received by the Department; the Department may wait until the sixtieth day to mail an objection, and if the objection falls on a holiday, the Department has until the next working day. Hearings on Extension of Voting Rights Act, 1975 (hereinafter referred to as "Hearings") at page 1523. A review of sample submissions in the print-out reveals that the full sixty day period and more, is frequently taken. Indeed, declination of a submission as inadequate (and the consequent suspension of the sixty-day limitation) is "frequent". Hearings at page 302. More important, there is evidence indicating that such declination may be used to gain time because of the sluggishness, or some other problem, of the bureaucracy. See Defendants' Response to Plaintiffs' First Interrogatories, Response No. 32, Attachment "B", inter-office memo. In short, the sixty day time frame is not realistic as shown by the record in the present case.

The review process of the Attorney General is especially worthy of examination in light of the Usery-Fry guidelines. There is no provision for a hearing; there are no written standards of review; there is a confidential file unavailable to submitting jurisdictions; there is no requirement of a finding of fact. There is no necessity of finding dilutive factors. Indeed, there is not even a necessity to reach conclusions that a change is discriminatory. As Justices White, Powell and Rehnquist observed in dissent in Georgia v. United States, 411 U.S. at 543-544: "And why should the state be forced to shoulder that burden where its proposed change is so colorless that the country's highest legal officer professes his inability to make up his mind as to its legality?" Given all this power, the Attorney General, nevertheless, is not subject to review of his actions. Morris v. Gresette, supra.

The alternative administrative route offered by Section 5 should be comprehensively reviewed by examination of both what it does not provide and what it does provide. It does not provide for:

1. A local office for making submissions and having conferences;

2. Standards to limit the action of the Attorney General and his large staff;

3. Administrative hearings (and adversary proceedings) on contested issues, including:

(a) Electoral changes vel non;
(b) Effect of electoral changes;
(c) Degree of effect (de minimis vel non);

(d) Purpose of electoral change; and
(e) Existence vel non of any of the dilutive factors (including bloc-voting);

4. Administrative findings of fact as to any of the foregoing;

5. A finding of discriminatory purpose and/or effect;

6. Judicial review of any of the foregoing administrative activities; or

7. A bailout procedure for a political unit within a covered state, regardless of culpability.

The administrative route offered by Section 5 does provide for:

1. A presumption of irregularity of local official action;

2. Administrative supremacy of the United States Attorney General;

3. Effectively, no expeditious and reliable alternative to a declaratory judgment action in the District of Columbia District Court;

4. Freezing of electoral processes and disenfranchisement in covered jurisdictions; and

5. Through its suggested remedies (i.e., single member districts), the real possibility of variance from the perfect one person-one vote goal, permanent compartmentalization

of the electorate, reinforcement of bloc-voting, and prevention of minority members' influence on the political system beyond the bounds of their single member districts. David vs. Garrison, 553 F.2d 923 (5th Cir. 1977).

Summarily, then, the "Star Chamber," non-reviewable nature of the supposed "rapid method" of preclearance makes submission to the Attorney General unacceptable and unrealistic.

One aspect of the Defendants' objections to the electoral changes in the City of Rome deserve special attention in the context of the Tenth Amendment. The Attorney General has found objectionable changes in the very structure of the City government. This is the type of interference with state activities that Mr. Chief Justice Burger implied to be objectionable in Milliken v. Bradley, 97 S. Ct. 2749 (1977). In approving certain remedies formulated by the court below to eliminate vestiges of Detroit's state imposed segregation, the Supreme Court was careful to note:

> The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourth Amendment... Nor are principles of federalism abrogated by the decree. The District Court has neither attempted to restructure local governmental entities nor to mandate a particular method of structure of state or local financing. Id. at 2762-2763. (Emphasis supplied.)

In the present case the Department of Justice is attempting to do exactly what Mr. Justice Burger clearly suggested to be a violation of the Tenth Amendment. The Department of Justice is attempting to restructure Rome's governmental entities and to mandate a particular method of local election, all in the absence of any finding of unconstitutionality with respect to the system that the City of Rome wishes to utilize. The City of Rome is thus penalized for having a different, but not unconstitutional, view than that of the Attorney General.

This record contains many feelings of ignominy, bewilderment and frustration shared by all the covered jurisdictions in their wrestling, not with the Voting Rights Act and its accomplishments, but with Section 5 thereof. Those feelings include: lack of incentive in the states "to get out from under the indignity" (Hearings at page 304); embarrassment because a state constitutional amendment had to be subjected to federal scrutiny and veto (Hearings at page 143); confusion about statewide election results (Hearings at page 143, 300-301); difficulty in dealing with the concept altogether (Hearings at page 349); concern about trouble and cost to some (but not all) the states (Hearings at page 589-590); and perhaps most profound of all, desperation at being disenfranchised (Hearings at pages 732-733).

Texas, which studied the effects of Section 5 when it came under its coverage in 1975, recognized still another counterproductive aspect:

> This "freezing effect", which some had feared in advance, is, in our opinion, the most disheartening

> aspect of the entire VRA controversy as, if it holds up, it may well mean that a law designed to protect voters has had the effect of denying them the opportunity to enjoy the effects of needed changes in local governmental systems and procedures. Second Request by Plaintiffs for Admission of Facts and Genuineness of Documents, Exhibit "B", page 174.

Perhaps the single most offensive attitude toward the covered jurisdictions in the record is revealed in the officially recognized instructions to those who would contact the Justice Department about their particular jurisdiction:

> If there is no hard evidence that it is discriminatory in some still undiscovered way, or even if you just have a hunch based on past experience that "they are up to something," this also should be explained to the Department. "Federal Review of Voting Changes" by David H. Hunter, Hearings at pages 1467, 1491.

The elected representatives of Rome, Georgia, were not "up to something" in 1966-1971, nor are they "up to something" now, except, as has been acknowledged by all the witnesses, to attempt to give the ultimate in representation to all their constituents.

Plaintiffs have admittedly mounted a broad-based attack upon Section 5. Our reference to the Tenth Amendment is actually a short-hand expression for a statement that Section 5 violates the entire federal structure of

the Constitution, and thus is void. "Congressional action which treats the states in a manner inconsistent with their constitutionally recognized independent status, therefore, should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant of authority, but because it would be contrary to the structural assumptions of the Constitution as a whole." L. Tribe, A Treatise on American Constitutional Law Section 5-20, at 301 (1978).

Admittedly, the adoption by this Court of a "new federalism" approach to Section 5 is a departure from South Carolina v. Katzenbach, supra, wherein the Court, although not addressing specifically the Tenth Amendment and concepts of federalism subsumed thereunder, did hold directly that the Voting Rights Act of 1965 was constitutional in all respects. Nevertheless, constitutional law has changed greatly since 1966, and the jurisdictions subject to the Voting Rights Act of 1965 have also changed. Many of the concerns of these jurisdictions are properly addressed only to the Congress, but this Court should deal with Section 5. Whatever justification it may have had in 1966 has been undermined and its overbreadth demonstrated by the ensuing years. In describing the nature of the judicial process, Mr. Justice Cardozo wrote of the process that has overtaken Katzenbach: "The bad will be rejected and cast off in the laboratory of the years. Little by little the old doctrine is undermined. Often the encroachments are so gradual that their significance is at first obscured. Finally we discover that the contour of the landscape has been changed, that the old maps must be cast aside, and the ground charted anew." B. Cardozo, The Nature of the

Judicial Process 142 (1921). This philosophy finds current articulation in Mr. Justice Harlan's opinion in Oregon, wherein he expressed his belief that the congressional attempt to lower the voting age by legislation was constitutional, stating, "I am satisfied that I am free to decide (this) case unshackled by a line of decisions which I had felt... entailed a basic departure from sound constitutional principle." 400 U.S. at 219.

C. Section 5 Of The Voting Rights Act, To The Extent That It Does Not Require A Showing Of Racially Discriminatory Purpose, Is Violative Of The Fifteenth Amendment Of The United States Constitution.

In paragraph 68 of the First Amended Complaint, Plaintiffs allege that Section 5 is null and void in that it violates the Fifteenth Amendment, to the extent that it requires a showing only of disproportionate racial effects, but not a showing of racially discriminatory purpose. This is a matter that has recently received detailed consideration by the Court of Appeals of the Fifth Circuit, but prior to the examination of this and other relevant case law, it must be noted that the record in the present case presents a series of annexations and political changes that were racially neutral in their purpose.

The Chairman of the Rome City Commission testified that there has never been any discussion of race in any annexation since he has been on the Commission. Hunter Deposition at page 46. Specifically, he testified that the Old Airport Community, the annexation first submitted to the Attorney General, was an

unincorporated island having sewerage problems located within the City. The Rome delegation to the Georgia General Assembly annexed it over the City's objections. Thus, there were clearly no racial motivations involved. Id. at pages 49-51. The other members of the Commission similarly testified that the Old Airport Community annexation as well as other annexations were made at the request of developers and homeowners in order to bring city services to them.

Defendants have admitted with respect to seven annexations that they would not have had a dilutive effect on minority voting power, if considered at the time of the annexation. Defendants' Response to Plaintiffs' Third Interrogatories, Response No. 6b. Presumably, Defendants made this admission since no voters resided in any of these annexed areas at the time of annexation.

In response to Plaintiffs' First Request for Admission of Facts and Genuineness of Documents, the Defendants answered that they were "without knowledge or information sufficient to determine whether the electoral changes" described in the First Amended Complaint " had as their purpose the denial or abridgment of the right to vote on account of race or color... ." Id. at Response No. 23. Similarly, Defendants indicated that they were "without knowledge or information sufficient to determine" whether the thirteen annexations to which the Attorney General continues to object were annexed "with a discriminatory purpose." Id. at Response No. 24. After Plaintiffs moved to have these requests deemed admitted, and this Court ordered the filing of an amended response, the Defendants stated that they had

"made reasonable inquiry into the electoral changes" described in Plaintiffs' First Amended Complaint "but have been unable to obtain information sufficient to enable Defendants to admit or deny that those changes had as their purpose the denial or abridgement of the right to vote on account of race or color." Defendants' Amended Response to Plaintiffs' First Request For Admission of Facts and Genuineness of Documents, Response No. 23. Similarly, Defendants indicated that they made reasonable inquiry into whether the remaining thirteen annexations were annexed with a discriminatory purpose, but "despite this inquiry, defendants have been unable to obtain information sufficient to enable them to admit or deny that those annexations had as their purpose the denial or abridgement of the right to vote on account of race or color." Id. at Response No. 24. It seems a fair inference from these responses that the Attorney General made no findings whatsoever with respect to the purpose of the Rome actions. In the first response, he indicated that he was without knowledge or information sufficient to form a belief as to the existence of purpose. Such absence of knowledge or information necessarily implies that he has made no finding. In his amended response, the Attorney General indicated that he made "reasonable inquiry" and was still unable to admit or deny that a prohibited racially discriminatory purpose existed. Thus, at the very least, these are admissions that no finding as to a discriminatory purpose has been made.

In response to Interrogatory No. 2 of Plaintiffs' Third Interrogatories. the Defendants emphatically state their lack of evidence as to purpose.

> Defendants have never contended that "the electoral changes and annexations generally described in Paragraphs 21 and 34 of Plaintiff's First Amended Complaint had as their purpose causing or leading to a retrogression of racial minorities with respect to their effective exercise of the electoral franchise in Rome, Georgia." Defendants do contend, however, that Plaintiffs must prove that such discriminatory purpose did not exist when the electoral changes and annexations were enacted, and, based upon the record as developed thus far in this case, it is our view that plaintiffs have failed to sustain their burden of proving the absence of a discriminatory purpose. Defendants' Response to Plaintiffs' Third Interrogatories at page 2.

Defendants have also admitted that they have no evidence of "lack of minority access to the process of slating candidates for the Rome City Commission" or "lack of minority access to the process of slating candidates for the Rome Board of Education." Defendants' Response to Plaintiffs' Third Interrogatories at page 4.

Finally, and most significantly, the constitutional issue has been sharply drawn in this case by Plaintiffs' Third Interrogatories No. 13, in which Defendants were asked:

> Please state, with respect to the electoral changes and annexations, whether Defendants:

(a) content that they were discriminatory in purpose; or

(b) contend that they were discriminatory in effect; or

(c) cannot determine whether they were discriminatory in purpose or not; or

(d) cannot determine whether or not they were discriminatory in effect or not.

Defendants responded directly and unequivocably to these requests in Defendants Response to Plaintiffs' Third Interrogatories. Defendants answered Interrogatory No. 13(a): "No." Defendants answered Interrogatory No. 13(b): "Yes." Thus, the issue of electoral changes and annexations as to which the Attorney General does not contend that there was a discriminatory purpose, but does contend that there was a discriminatory effect, is directly presented. As to the annexations, this position was presented very early in this matter in the letter of Assistant Attorney General J. Stanley Pottinger dated October 20, 1975 in which he indicated: "We cannot conclude that the thirteen annexations in question do not have a racially dilutive effect on voting in Rome." Obviously, the Attorney General made no finding with respect to "purpose".

The statute itself requires a showing of both purpose and effect. A "qualification, pre-requisite, standard, practice, or procedure" that a state wishes to adopt must be submitted to this Court and it must find that it "does not have the purpose and will not have the effect

of denying or abridging the right to vote on account of race or color... ." (Emphasis supplied.) The standard applied by the Attorney General in his disposition of his Section 5 responsibilities is said in his regulations to adopt a conjunctive, rather than an alternative, test. See 28 C.F.R. Section 51.4. In any event, the "Attorney General is obliged to adjudicate Section 5 submissions in the same manner the Court adjudicates declaratory judgment actions". Harper v. Levi, 520 F.2d 53, 69 (D.C. Cir. 1975), rev'd on other grounds, in Morris v. Gressette, 97 S. Ct. 2411 (1977). Notwithstanding the clear use of the conjunctive "and" in Section 5 of the Act, as opposed to the alternative "or" in Section 4 of the Act dealing with bailout, the Defendants have interposed objections to the City of Rome's electoral changes and annexations where they admittedly made only a finding, which Plaintiffs strenuously question, of discriminatory "effect." To the extent that the Defendants are correct with respect to the meaning of "and" in Section 5, the section is unconstitutional because the Fifteenth Amendment requires a showing of discriminatory "purpose".

Plaintiffs do not dispute that each of the electoral changes and annexations sought to be precleared constitute a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of Section 5, under the Supreme Court decisions interpreting that provision. The "at-large" provision which has existed in Rome, Georgia at least since 1918, the reduction in number of wards from nine to three to which the U.S. Attorney General did not object upon submission to him, and the forty-seven annexations to which the U.S. Attorney General has withdrawn his objection are not subject to chal-

lenge before this Court. Consequently, the issue here is limited to the validity under Section 5 of the electoral changes and annexations described above.[11] Plaintiffs contend that their electoral changes and annexations satisfy the requirements of Section 5 for the reason that they do not lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. Beer v. United States, 425 U.S. 130, 141 (1976).

A. The Electoral Changes And Annexations Were Not Enacted With A "Purpose To Discriminate" And Should Be Precleared By This Court.

Plaintiffs satisfy the requirements of Section 5 by showing a lack of "purpose to discriminate." To the extent that Section 5, on its face, may be deemed to require anything more, it violates the Fifteenth Amendment upon which it is based. To the extent that Section 5 may be applied in such a way as to require anything more, such application is unconstitutional as a violation of the Fifteenth Amendment, as previously set forth in this memorandum.

The elected representatives of Rome citizens have sworn in this record that there existed no racial motivation in the passage of the legislation effecting the electoral changes and thirteen annexations which have heretofore

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[11] Plaintiffs respectfully refer the Court to the Memorandum of Points and Authorities in Support of Private Plaintiffs' Motion for Partial Summary Judgment at pages 2-8 for discussion of the factual background of these changes in addition to that presented.

been objected to by the United States Attorney General and which are now the subject of preclearance by this court.

The electoral changes in the City charter and four of the annexations objected to were, at the request of the Rome City Commission, effected by state legislation initiated by local state representatives. Those representatives have denied any racial motivation whatsoever in the exercise of their legislative powers. Affidavits in Support of Plaintiffs' Motion for Summary Judgment of J. Battle Hall and Jerry L. Minge.

The City Commissioners, who effected the other nine annexations (since November, 1964) objected to, have denied any racial motivation whatsoever, in the exercise of their legislative powers. Affidavits in Support of Plaintiffs' Motion for Summary Judgment of Grover C. Byars, Tom C. Caldwell, S. L. Hancock, David D. Harvey, Herman M. Holcombe, Ralph M. Howse, H. F. Hunter, Jr., Ben Lucas, Tom McEver, Lucien K. Oldham, R. L. Starnes, and John E. Yarbrough; Hamler Deposition at pages 28, 116, 120; Hunter Deposition at pages 45-51; Harvey Deposition at pages 40-43, 45-46.

Voting dilution claims founded on the Fourteenth Amendment require a showing of intentional discrimination. Washington v. Davis, 426 U.S. 229 (1976). The same showing is required in Fifteenth Amendment dilution claims. Nevett v. Sides, supra.

The record in this case shows that the electoral changes were all implemented as the state law required, by state representatives upon the petition of city officials. These changes

were deemed necessary generally to modernize the city ward configuration and election laws, as indicated by a letter dated July 6, 1965, from the Rome City Attorney recommending such changes. In addition to the necessity of redrawing the wards, staggered terms were deemed desirable, because of first-hand observation and experience with the lack of continuity in government. The majority vote requirement was instituted simply to track the unofficial guide to the conduct of city elections, the Georgia Election Code, which had just been passed in 1964 by the General Assembly of Georgia. The evidence of the purpose of these changes is contemporaneous with the time of their recommendation, logical and non-conclusory. The record does not disclose any alternative options for the objectives desired by the city officials.

The City Attorney's letter does not contain even a hint of any racial consideration in the recommendation. Indeed, as the City Attorney pointed out, it would have been counterproductive to the incumbent commissioners' politics to have diluted the vote of any black persons, because a great majority of those black persons supported the incumbent city administration. Clary Deposition at pages 56-58, 69. Moreover, as shown, the record contains the sworn testimony of the then City Attorney, the then and present City Manager and the state representatives that there was not any racial motivation whatsoever in the enactment of those changes. Finally, Defendants in the present case do not contend that unlawful purpose existed. See Defendants' Response to Plaintiffs' Third Interrogatories, Response No. 13.

The four (objected to) annexations effected by local legislation in the state legislature are shown as numbers (1), (2), (3) and (53) on Exhibit 35 of the Second Supplement to Parties' First Stipulation of Facts. Number (1) had no population at the time of annexation; Number (2) had 144 whites and no blacks at the time of annexation; Number (3) had 78 whites and 3 blacks at the time of annexation. Plaintiffs' Response to Defendants' Interrogatories, Response No. 8, Exh. 4. More importantly, at the time of annexation, (1) had no registered voters; (2) had 31 registered voters; (3) had 8 registered voters. Clearly, any resulting impact on voting would be de minimis at most. Moreover, as shown, the representatives testified under oath that they did not have any racial motivation in effecting those annexations.

The "Old Airport Community" annexation (Number (53)) was, it has been seen, effected by the state legislature over the objection of the Rome City Commission. It contained 781 white persons and no black persons at the time of annexation, and it contains only 511 white persons and no black persons at the present time. It contained only 241 registered voters at the time of annexation and only 203 at present. Plaintiffs' Response to Defendants Interrogatories, Response No. 8, Exh. 4. Sworn testimony shows that there was no racial motivation behind that annexation, and the purpose of said annexation could not be more clearly stated: it was a health hazard with a profound need for sewer services which could only be provided by the county government. Hunter Deposition at pages 49-51.

The remaining (objected to) annexations were effected through local ordinance by

the Rome City Commission. They are numbers (9), (13), (16), (18), (20), (39), (40), (43), and (52) as shown on Exhibit 35 of the Second Supplement to Parties' First Stipulation of Facts. At the time of annexation, only one of them contained any population at all, to-wit: (13) Battey Hospital, which had 35 white residents, no black residents, and of those, only 8 were registered voters -- clearly, a de minimis effect. Plaintiffs' Response to Defendants' Interrogatories, Response No. 8, Exh. 4.

The general purpose of annexations can probably be the subject of judicial notice by this court; however, the record contains testimony by long-time city officials who are qualified to state the need for, and purpose of, annexations: city growth and development, the provision of services, and a broadening of the tax base. Hamler Deposition at pages 136-37, 164-65; Wade Deposition at pages 34-35. The purposes of the specific annexations objected to were consistent with those general purposes. Harvey Deposition at pages 40-46; Hunter Deposition at pages 45-51; Hamler Deposition at pages 164-65. In any event, as shown, the City Commissioners who effected the latter annexations have each sworn that the areas were annexed without any racial motivation whatsover. The City Manager confirms the truth of that position. Hamler Deposition at pages 28, 116, 120.

The purpose of the electoral changes and annexations is, thus, undisputed. It is also undisputed that the purpose of the electoral changes and annexations was not racial motivation. Plaintiffs submit that they have satisfied the burden imposed by Section 5.

In this case, the evidence is undisputed that the political processes of the City of Rome are equally accessible to blacks. Indeed, the evidence in the record indicates that bloc-voting by race does not exist in Rome, and this should, Plaintiffs submit, be dispositive of the issue. Based upon years of supervision and observation, the County Voter Registrar and the Probate Judge-Municipal Election Superintendent testified that there was no bloc-voting by race in Rome. Johnson Affidavit; Harry Johnson Affidavit. City Commissioners, the former City Attorney, and the City Manager testified similarly. Harvey Deposition at page 65; Hunter Deposition at pages 17-18, 75; Wade Deposition at pages 12-13, 39-40, 43; Clary Deposition at pages 59-60, 81-85; Hamler Deposition at pages 120-121, 159-161. Black witnesses were less positive and divided as to this issue: Compare Jackson Deposition at pages 53-55, 66-67, and Hill Deposition at pages 33-37 with Aycock Deposition at pages 19-20. Mr. Jackson testified that Mr. Aycock and Mrs. Martin would have white support in an election. Jackson Deposition at page 55. He himself has been asked by white citizens to run for office (Jackson Deposition at pages 41-42), as has Mr. Carmichael (Carmichael Deposition at pages 31-32), and Mr. Aycock, Mrs. Watkins, Mrs. Chapman, and Mr. Fiedler (Fielder Deposition at pages 59-63).

There have existed during elections in Rome at least three different "lists" as to who would be the best representative of the black community. Jackson Deposition at pages 30-33, 49-53. The leader of the Voter Education Project and a former black candidate for City elective office both testified that blacks would vote for the better candidate regardless of his

color. Jackson Deposition at pages 53-54; Houser Deposition at pages 17-18. Indeed, the Voter Education Project leader agreed that the point was "blacks getting the representation that they want as opposed to blacks putting blacks in office." Jackson Deposition at page 67. All witnesses agreed that the city officials in Rome have been very responsive to the electorate, black and white alike, and named at least four different City Commissioners as the most responsive to the black community: Mr. Harvey (Jackson Deposition at pages 33-34, 42-43); Mr. Hunter (Moreland Deposition at page 22); Mr. Caldwell (James Wright Deposition at pages 39-40); and Mr. Wade (Joe Wright Deposition at pages 36-37). Black citizens get good results when they go to Mr. Hamler, the City Manager. Jackson Deposition at pages 32-33, 43-45, 65; Carmichael Deposition at pages 30, 39-40; Moreland Deposition[13] at page 22; Fielder Deposition at page 56.

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[13]The Government took the deposition of a James W. Loewen, who, as a reputed expert, testified that bloc-voting by race existed in Floyd County in the U.S. Senatorial race of 1968. (It is assumed that the Government will contend that this deposition is admissible, and that it is evidence of the general existence of bloc-voting by race in Rome). The admissibility of this testimony for any purpose will be challenged in Plaintiffs' Responsive Brief. Other witnesses also opined as to the existence vel non of such phenomenon. The principal difficulty in making such a determination is and has been the lack of many black-white election contests and of any such contests wherein different and sufficient election precints were utilized.

Notwithstanding this apparent lack of bloc-voting, Plaintiffs respectfully invite the Court to examine the evidence as categorized and captioned according to the various factors that have been deemed significant in Section 5 determinations.

Population, Age and Registration Statistics by Race

The City of Rome, Georgia, is a city of 30,759 population, 76.6% white and 23.4% black. Total voting age population is 79.4% white, 20.6% black. Registered voters total 13,097: 10,982 white (83.9% of total voting age; 66% of white voting age); 2,026 black (15.5% of total voting age; 46.7% of black voting age) Parties' First Stipulation of Facts, paragraphs 2-3.

Minority Access to Political Process

REGISTRATION FOR VOTING AND VOTING. There is no evidence that because of past discrimination, present black participation is less than effective. Indeed, the opposite is true. There has never, in the memories of all its citizens (ranging from ten (Thomas Deposition at pages 16-17) to forty-eight (Aycock Deposition at page 7) years, been any obstruction to, or limitation upon, registration for voting and voting in the City of Rome.

The black witnesses, deposed by the Government, so testified. Fielder Deposition at page 70; Joe Wright Deposition at pages 42-43, 48; Moreland Deposition at pages 48-49, 54; Aycock Deposition at pages 44-45; James Wright Deposition at pages 23, 29.

Mr. James Wright, a black leader, affirmatively stated, "Rome hasn't had that problem."[14] James Wright Deposition at page 23. Mr. Fiedler is a black voter registrar, and has never encountered any problems or hindrances. Fielder Deposition at page 41. Voter registration drives among blacks have been active, and registration has been encouraged and supported by city government. Jackson Deposition at pages 8-10; Moreland Deposition at pages 48-49; James Wright Deposition at pages 7, 49; Aycock Deposition at page 45; Clary Deposition at pages 34-36, 58-61; Wade Deposition at pages 42-43, 46. Indeed, it is undisputed that neither a literacy test nor an oath has never been used in Rome. Mrs. Beard Affidavit (2); Harry Johnson Affidavit; Mrs. Dowdy Affidavit; Plaintiffs' Response to Defendants' Interrogatories, Responses Nos. 1 and 2. Furthermore, the City Manager and Assistant City Manager have even accompanied black persons to see that they registered and allowed registration by those who could not write. Hamler Deposition at pages 18-21, 128-130; Beard Affidavit; Dowdy Affidavit. No one has ever been refused

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[14]Indeed, Dr. John Houser, a black witness deposed by the Government, not only stated that he knew of no voting problems, but also added: "If you are asking about racial problems, I don't remember any racial problems here." Dr. Houser Deposition at pages 13-14. Segregation of public facilities in historically unknown in Rome (Aycock Deposition at page 71), at least in the last 40 years. Hamler Deposition at pages 85-87, 165.

the right to register to vote. Hamler Deposition at pages 18-19.[15]

Just as in the case of voter registration, voting by blacks has been actively encouraged by all, white and black alike. Hamler Deposition at pages 18-19, 44-47, 52-55, 127-128; Jackson Deposition at pages 8-10; Aycock Deposition at pages 61-61.

POLITICAL INFLUENCE AND EFFECTIVENESS. Black citizens have, and exert, trememdous influence on candidates and elections. Clary Deposition at pages 58-61. White candidates have vigorously wooed the black voters. Clary Deposition at pages 58-61; Hamler Deposition at pages 44-47; Aycock Deposition at pages 39-41. Indeed, those incumbent City Commissioners whose depositions were taken testified that they spent more than 50% of their time seeking votes from blacks. Wade Deposition at pages 17-18; Harvey Deposition at pages 18-24; Hunter Deposition at pages 14-17, 27. Such campaigning consists, inter alia, of attending speaking engagements (Clary Deposition at pages 58-62; Harvey Deposition at pages 22-24; Hunter Deposition at pages 14-17; Jackson Deposition pages 58-59, 63-64; Moreland Deposition at pages 37-38; Wade Deposition at

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[15]Defendants have no evidence that the foregoing facts concerning registration are inaccurate or questionable. Defendants' Response to Plaintiffs' Second Requests for Admission of Facts and Genuineness of Documents, Responses Nos. 3, 4 & 12.

pages 17-18), transportation of black voters to the polls (Hamler Deposition at pages 52-55; Hunter Deposition at page 60), consultation with black leaders (Clary Deposition at page 62), and seeking to be named on the important recommendation "lists" circulated by different groups of black citizens during elections (Jackson Deposition at pages 30-33, 49-52; James Wright Deposition at pages 31-33; Aycock Deposition at pages 21-22, 32-34; Wade Deposition at pages 12-13).

SLATING AND CANDIDACY. Although there is absolutely no evidence of lack of minority access to the process of slating candidates for the City Commission or the Board of Education (Defendants' Response to Plaintiffs' Third Interrogatories, Responses No.s 4(a), 4(b), 32(c)), blacks, as viable candidates, have been scarce in Rome. None of the recognized leaders has ever run. Fielder Deposition at pages 59, 63; Jackson Deposition at page 37; Moreland Deposition at page 30. Prior to 1964, blacks ran for office unsuccessfully, including Dr. Houser, who did not receive a plurality. The leader of the Voter Education Project felt that Dr. Houser did not have black support against his white opponent. Jackson Deposition at pages 56-57. Since the electoral changes of 1966 and the following years, other blacks have run. None, except one, was recognized as a viable candidate: Mr. Stubbs was unknown (Jackson Deposition at page 57); Mr. Tanner was not a leader (Jackson Deposition at page 65). Although recognized black leaders have been asked to run by both whites and blacks (Jackson Deposition at pages 41-42), they have not run: Mr. Aycock, Mr. Vaughn, Mrs. Eva Martin, Mrs. Martha Ware (Jackson Deposition

at page 37); Mrs. Watkins, Mrs. Chapman, Mr. Fielder (Fielder Deposition at pages 59, 63); Mr. Joe Wright, Mr. Coefield, Mr. Burrell, Mr. Moreland, Mr. Walker (Moreland Deposition at page 30); Mr. Carmichael (Carmichael Deposition at pages 31-32). The City Manager believes that blacks do not get elected because they have not chosen to run. Hamler Deposition at pages 49, 138-139.

RESPONSIVENESS OF REPRESENTATIVES. The black witnesses, deposed by Defendants, were unanimous in the view that city officials have been very responsive to the needs of black citizens. Moreland Deposition at pages 22, 38-41; Jackson Deposition at pages 25, 32-34, 42-45, 65; Houser Deposition at pages 11-15; Carmichael Deposition at pages 24, 30, 39-40; Fielder Deposition at page 56; James Wright Deposition at pages 39-40, 44, 46-47; Joe Wright Deposition at pages 29-31, 36-38. Indeed, Mr. Moreland calls the City's response "the ultimate." Moreland Deposition at page 40. Dr. Houser had heard no complaints about responsiveness. Houser Deposition at page 28.

CITY SERVICES. The City has gone to great lengths to provide city services and improvements in predominantly black areas. If there has been any discrimination in expenditure of public monies based upon the predominant race of the area, it has been in favor of the blacks. Hamler Deposition at page 57. Street improvements have been abundant. Almost every street in black areas has been repaved in the last ten years, and approximately 65% of the asphalt poured by the City in the last six years has been in black areas. Hamler Deposition at pages 57-66, 141-142, Exh. 1. Street lighting

in black areas has been equal to or better than in white areas. Hamler Deposition at pages 67-73, 142-43, Exh. 2. The money expended on parks and recreation areas in predominantly black neighborhoods has been two to three times that spent in white areas. Hamler Deposition at pages 76-81; Wade Deposition at pages 27-31; Hunter Deposition at pages 65, 79-80. Many housing projects and improvements, heavily utilized by blacks, have been completed. Hamler Deposition at pages 81-85, 144-45, Exh. 4; Hunter Deposition at pages 41-44. The City transit department, of which the ridership is 65-70% black, has been a continuous and serious drain on the City treasury, and, in spite of frequent consideration to discontinue it, it has been subsidized from year to year at tremendous expense. Hamler Deposition at pages 91-98, 157-157, Exh. 5, Wade Deposition at pages 22-26. There has been no complaint at all about lack of police protection in black neighborhoods. Hamler Deposition at page 150.

Although there has never been a request to annex subdivisions containing many black families (Clary Deposition at pages 88-90; Aycock Deposition at pages 21-22), because there just are not any, the City has assisted and provided services to areas not contiguous and, hence, not annexable. Hamler Deposition at pages 124-26; Hunter Deposition at page 53. See generally Harvey Deposition at pages 34-38.

PUBLIC EMPLOYMENT. The racial composition of the City's work force very closely approximates the population percentage. The percentage of black employees in the school system exceeds the percentage of population. Hamler Deposition at pages 98-115, Exh. 6 & 7;

Wade Deposition at pages 32-33; Hunter Deposition at pages 28-29; Clary Deposition at pages 65-66. A substantial portion of these jobs are skilled and supervisory, and there are several school principals and assistant principals. Hamler Deposition at pages 100-101, 112.

Plaintiffs respectfully submit that their right to preclearance of the electoral changes and annexations has been established under all recognized tests. Plaintiffs believe that they are entitled to the declaration of this Court to this effect.

(Remainder of Pleading Omitted in Printing)

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Title Omitted in Printing)

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PRIVATE PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

May 8, 1978

II. BACKGROUND OF ELECTORAL CHANGES AND ANNEXATIONS

The City of Rome has voted at large at least since 1918, when the present Charter was enacted. (Parties' First Stipulation of Facts, paragraph 4, Exh. 1). Beginning with a charter amendment in 1929, the City of Rome had nine wards. (Parties' First Stipulation of Facts, paragraph 12, Exh. 2). As territory was annexed it became a part of the ward, or wards, to which it was contiguous. (Clary Deposition at 27). Because of the not unusual

difference in growth patterns and rates in the various areas of town, the wards, as of 1965, varied widely in size and population. (Clary Deposition at 27). Indeed, the disparateness of the size of the wards was grotesque. (Hunter Deposition at 8; Hamler Deposition at 23; Clary Deposition at 28-29, 41; Stipulation, First Supplement, Exh. 36). Although the City voted at large, there existed a requirement that each commissioner reside in a particular ward (Parties' First Stipulation of Facts, paragraph 10, Exh. 1), and he was recognized as representing that ward (as well as the City as a whole). Each commissioner had the same voting power. It is customary that persons residing in a particular ward call their representative from that ward rather than the others. (Clary Deposition at 74-76).

In the wake of the one man-one vote decisions of the U. S. Supreme Court (Reynolds v. Sims, 377 U.S. 533, and progeny), in 1965 the local city attorney of Rome recommended (Clary Deposition, Exh. 1; Hamler Deposition, at 132-134) that the Commissioners cause to be redrawn the wards of the City to reflect more accurately the population distribution.[1] (Clary Deposition at 41 and Exh. 1). As it happened, the geography of Rome provided a ready and natural division: the three rivers (the Etowah,

[1] It will be remembered that voting principles began to undergo remarkable changes during that period. Baker v. Carr 369 U.S. 186; Reynolds v. Sims, 377 U.S. 533; Avery v. Midland County Texas, 390 U.S. 474.

the Oostanaula and the Coosa) which have their confluence at Rome divide three areas (Hamler Deposition at 26-27) each of which reasonably proximated each of the other two in population. (Clary Deposition at Exh. 1). There also existed a need and desire for stability in the Commission so that the concept of staggered terms was recommended.[2] (Clary Deposition at 45-47; Hamler Deposition at 24). The reduction of wards from nine to three combined with the desire to keep the nine-member commission, which had existed since 1929, naturally dictated the use of "seats" or numbered posts, which were also recommended (Clary Deposition at 51-54, Exh. 1). In 1964, the State of Georgia had enacted the Georgia Election Code, which established a majority-vote requirement for victory in elections. (Clary Deposition at 54-55). Although the Election Code did not apply to municipalities within the state, (Second Supplement to Parties' First Stipulation of Facts, Exh. 44), it had been an unofficial guide to the conduct of city elections and it was recognized that a majority vote requirement was

[2] Officials of Rome were (and are) acutely aware of the ineffectiveness of non-staggered terms, in that they had a ready comparison with the governing body of Floyd County, which historically has been swept out of office, leaving no carry-over experience whatsover. As a result, county government has been generally ineffective. See Hamler Deposition at 24; Hunter Deposition at 12-13; Harvey Deposition at 11-15.

needed (Clary Deposition at 54-55). The at-large feature was not changed, as it was desired to retain total responsiveness and avoid "ward-heeling." (Hunter Deposition at 69-70; Clary Deposition at 48-50; Exh. 1; Hamler Deposition at 161-162, 165-167.

In Georgia, municipalities have some "home-rule" powers; however changes in electoral processes, inter alia, are not a part thereof. Those are reserved to the Georgia Legislature (General Assembly). (Second Supplement to Parties' First Stipulation of Facts, Exh. 38, 44). In the absence of a specific "home rule" power, the requirement for amending a city charter is to petition for the initiation of a proposed change by the delegation of state representatives and senator from the legislative district in which the city is located. (Clary Deposition, Exh. 1). The General Assembly convenes annually in a forty-day session (Second Supplement to Parties' First Stipulation of Facts, Exh. 40); local legislation may be introduced by a local legislative delegation only after an official "Notice of Intention to Introduce Local Legislation" describing the bill is properly advertised.[3] (Second Supplement to Parties' First Stipulation of Facts, Exh. 39, 40).

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[3]Moreover, the Georgia Constitution and statutory law require that whenever the term of an elected person is to be changed during such term such change must be approved by the people in a referendum on the question. (Second Supplement to Parties' First Stipulation of Facts, Exhibits 39, 41). Such a requirement in

The above procedure was followed, and the City of Rome amended its charter in 1966 and the_____years thereafter generally to provide for the recommended changes thought to be necessary and desirable. In the meantime, the Voting Rights Act of 1965 became effective. As many other covered jurisdictions,[4] the City of Rome did not, until requested by the U.S. Attorney General, submit the changes for preclearance. (Parties' First Stipulation of Facts, paragraphs 26-32). Also, in the meantime, the state of Georgia passed and submitted similar changes generally applicable to all cities in the State,[5] and the U.S.

(Footnote 3 continued)
the context of time, uncertainty and the interplay of federal and state laws, further complicates the legislative process and severely interferes with the city's ability to function effectively. See Plaintiffs' Memorandum, pp. 24-27, 29, 31, 34-36, 40.

[4]Section 5 "remained practically dormant for several years." Hearings on Extension of the Voting Rights Act of 1965 before the subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, 94th Sess., ser. 1, Parts 1 and 2 (1975) (hereinafter referred to as "Hearings", p. 1480). It had barely begun to be implemented in 1969 and 1970 (Hearings, p. 169, 1480).

[5]Between the enactments of 1966 and 1967 and the submission of such enactments, specifically, in 1968, the Georgia Municipal Code (applying to all municipalities in Georgia, including

Attorney General precleared said changes (Defendants' Responses to Plaintiffs' First Requests for Admission of Facts and Genuineness of Documents, Section 6).

In 1967, the City of Rome conducted an election for members of the Rome Board of Education, in accordance with the 1966 Charter amendments. (Parties First Stipulation of Facts, Exh. 3-8, 26). In 1968, the City of Rome conducted an election for Rome City Commission in accordance with the 1966 and 1967 charter amendments (Parties' First Stipulation of Facts, Exh. 3-8, 26). In 1970, the City of Rome conducted elections for both Board of Education and City Commssion, in accordance with the 1966 and 1967 charter amendments (Parties' First Stipulation of Facts, Exh. 3-9, 27, 28, 29). In 1972, the City of Rome conducted elections for both Board of Education and City Commission, in accordance with the 1966,

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(Footnote 5 continued)
the City of Rome) was submitted by the Attorney General of the State of Georgia to the Attorney General of the United States. (Parties' First Stipulation of Facts, Sections 6-8). Sections thereof which determined applicability (Section 34A-102), and which provided for a majority vote requirement (Section 34A-1407(a)), run-off elections (Section 34A-1407(b)), and the designation of posts (Section 34A-902) were not objected to. (Parties' First Stipulation of Facts, Section 7; Second Supplement to Parties' First Stipulation of Facts, Response to Plaintiffs' First Request No. 6, Exhibit "A").

1967, 1970 and 1971 charter amendments. (Parties' First Stipulation of Facts, Exh. 3-11, 30). In 1974, the City of Rome conducted elections for both Board of Education and City Commission in accordance with the 1966, 1967, 1970 and 1971 charter amendments. (Parties' First Stipulation of Facts, Exh. 3-11, 31).

In 1971, the case of Perkins v. Matthews, 400 U.S. 379, was decided, and, in the same year, the Justice Department first issued regulations and guidelines on making submissions. Prior to that time Section 5 had remained practically dormant, and relatively few submissions had been made. (Hearings, pp. 169-170). Indeed, states and cities had no guidelines until then. (Hearings, p. 170).

In 1973, the General Assembly of the State of Georgia annexed into the City of Rome a certain area known as the "Old Airport Community," which area was an unincorporated island completely surrounded by the City but not receiving City services, including badly-needed sewer services. (Parties' First Stipulation of Facts, Exh. 23; Hunter Deposition at 49-51). The annexation was effected as a local law introduced into the General Assembly by the local Floyd County legislative delegation, without impetus from, or even approval of, the Rome City Commission. (Hamler Deposition at 43-44; Harvey Deposition at 45-46.

The City of Rome, also since November, 1964, had annexed (by ordinance), or caused to be annexed (by petitioning the legislative delegation to initiate local legislation in the State General Assembly) some fifty-nine (59) other areas. (Parties' First Stipulation of

Facts, paragraphs 23-26, 29). These were effected as the area grew and developed in order to increase the tax base and provide services. (Hamler Deposition at 31-41, 136-137, 164-165; Wade Deposition at 34-35; Hunter Deposition at 45-49; Harvey Deposition at 40-45). Many of these annexations (and at least eleven of those to which objection still exists, (Parties' First Stipulation of Facts, p.25) were effected prior to the Perkins decision and the promulgation of the Attorney General's regulations when it first became known that annexations had to be pre cleared. Defendants admit that each of the unpopulated areas annexed, if submitted and considered alone at the time of the annexation, would not be considered to have a dilutive effect on minority voting power. (Defendants' Response to Plaintiffs' Third Interrogatories No. 6). No area containing black residents was ever refused annexation. (Hamler Deposition at 163-164).

The City Attorney submitted the "Old Airport Community" annexation to the Attorney General in 1974. (Parties' First Stipulation of Facts, paragraph 26). It was at that time that a long series of communications and correspondence between the City Attorney and the Attorney General began, as can be seen in the record. (Parties' First Stipulation of Facts, paragraphs 26-36; Second Supplement to Parties' First Stipulation of Facts, Exh. 45). Detailed information was required by the Attorney General, with respect to the electoral changes of 1966-1971, the Old Airport Community annexation and the other fifty-nine Rome annexations which had taken place since November, 1964, but had not been submitted.

The Attorney General, at first, requested additional information. He then objected to all sixty of the annexations. He then reviewed and objected to the imposition of a majority vote requirement, numbered posts and staggered terms in Commissioner and Board of Education elections and the imposition of residency requirement in Board of Education elections. The reduction in the number of wards from nine to three was not objected to. (Parties' First Stipulation of Facts, Paragraph 30). Objections to forty-seven of the annexations, mostly commercial and industrial, were later withdrawn (Parties' First Stipulation of Facts, paragraph 34), but objection was maintained as to thirteen annexations, most of which, with the exception of the Old Airport Community, had little or no population at the time of annexation. (Aff., Hancock; Harvey Deposition at 40-45). The City of Rome moved for reconsideration and included evidence as to lack of racial bloc voting in Rome. (Parties' First Stipulation of Facts, paragraph 35; Second Supplement to Parties First Stipulation of Facts, Exh. 45). Reconsideration was denied. (Parties' First Stipulation of Facts, paragraph 36).

During the submission process, the election scheduled for 1976 approached, and pre-clearance not having been obtained, the election was not held. The City of Rome and Private Plaintiffs proceeded to Court. No local election has been held in Rome since 1974. (Parties' First Stipulation of Facts, paragraph 42).[6]

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[6]Elections could not be held under the pre-November, 1964 law because the Attorney

I. ARGUMENT

Private Plaintiffs, the citizens of Rome, black[7] and white, are nothing less than bewildered at any law which would have the articulated purpose, and the inevitable effect, of completely disenfranchising all the citizens, including those undeniably innocent of instituting any electoral changes--whether with discriminatory purpose, effect or whatever. Private Plaintiffs are not responsible for, nor do they have any realistic control over, any legislation, state or local, which changes electoral laws and ordinances in Rome. The closest

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(Footnote 6 continued)
General had not objected to the reduction of wards from nine to three and that (effective) provision was inextricably interwoven with the other (ineffective) electoral changes. (Parties' First Stipulation of Facts, Exh. 111). Moreover, the staggered terms and other new procedures had been fully implemented in the elections of 1968, and, there having already been two elections (Response to Plaintiffs' Second Request No. 1) under the validly enacted (Response to Plaintiffs' First Request for Admissions, No. 6-15) but unprecleared laws, the Board of Education and the City Commission consisted of members with varying terms.

[7]Napoleon Fielder, a local black leader, testified that political activity and interest in the black community was diminished because "we haven't had an election in a long time." (Fielder Deposition at 23, 45).

thing to "control" over such legislation available to Private Plaintiffs, it might be argued, would be ballot box control over the city commissioners who do have legislative powers; however, the ballot box is, paradoxically, denied them. In their bewilderment, Private Plaintiffs understandably label Section 5 counterproductive, to the say the least.

The "freezing effect" on the electoral process is particularly notable, as in Richmond and New Orleans, in the City of Rome as a result of the interplay of federal-state laws.[8]

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[8]The anomalous result of Section 5 probably cannot be better described and exemplified than in a March 2 1977, Washington Post article describing the City of Richmond's experience with the "unusual procedure":

> Virginia capital city elected its first City Council in seven years today...
>
> * * * * * * * * * * *
>
> The Richmond City Council apportionment plan grew out of a long entangled court fight, laced with racial divisiveness and ironies in which a black civil rights activist with a fragmentary following set out to fight city hall and won--after a fashion.
>
> But the cost of his battle was $763,559 in legal fees, a six-year disenfranchisement for both blacks and whites in Richmond, the freezing in power of a City Council he

As heretofore stipulated and shown, there has not been a local election in Rome since 1974. There cannot be one now. Private Plaintiffs have been unable to express their political beliefs, to associate to advance ideas,

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(Footnote 8 continued)

was trying to evict and the near atrophy of the Richmond Crusade for Voters, the most powerful black political organization in the State.

The citizens of Richmond and the Virginia State Senate had earlier pleaded with the Congressional Committee studying the proposed 1975 Extension of the Voting Rights Act to end their disenfranchisement. Hearings, pp. 732-733.

New Orleans had a similar experience:

"As a result [of the refusal to preclear a reapportionment plan] there have been no council-manic elections in New Orleans since 1970 and the councilmen elected at that time (or their appointed successors) have remained in office ever since." (Beer v. United States, 425 U.S. 130, 138 (1976)

There are no doubt many more, as this freezing effect was, indeed and surprisingly, the intent of Congress. (Beer v. United States, supra, at page 140).

The City of Rome now finds itself, as explained in n. 6 ante, in this strange and unrepublican "hold pattern."

to support candidates, to run for local office and to vote because their local government and political parties have been unable to provide them with the vehicle of an election by which to do so. Moreover, this expected periodic event, designed to bring at any time those in authority to the bar of public opinion,[9] has been denied even though the law of Private Plaintiffs' state mandates it.[10]

SECTION 5, ON ITS FACE AND IN ITS APPLICATION, VIOLATES PRIVATE PLAINTIFFS' FIRST AMENDMENT RIGHTS

The Supreme Court has consistently, for decades, recognized the constitutional necessity of, and protected, the continuing

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[9] Wood v. Georgia, 370 U.S. 319, at 392:

"The purpose of the First Amendment includes the need...'to protect parties in the free publication of matter of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.'" See also Elrod v. Burns, 427 U.S. 347.

[10] See p. 15-16, 24 of Plaintiffs' Memorandum.

availability of the franchise for all citizens, and has never sanctioned its prolonged deferment or deprivation. Ex parte Siebold, 100 U.S. 371 (1880); Nixon v. Herndon, 273 U.S. 536 (1927); Lane v. Wilson, 307 U.S. 268 (1939); Baker v. Carr, 369 U.S. 186, 189 (1962); Gary v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Carrington v. Rash, 380 U.S. 89 (1965); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Kramer v. Union School District, 395 U.S. 621 (1969); Cipriano v. City of Houma, 395 U.S. 701 (1969); Evans v. Cornman, 398 U.S. 419 (1970); City of Phoenix v. Kolodzieski, 399 U.S. 204 (1970); Bullock v. Carter, 405 U.S. 134 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972). See also: Rosario v. Rockefeller, 410 U.S. 752 at pages 764-5 (dissent); CSC v. Letter Carriers, 413 U.S. 548, at pages 596-8 (dissent).

(REMAINDER OF PLEADING OMITTED IN PRINTING)

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THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(TITLE OMITTED IN PRINTING)

RESPONSE OF PLAINTIFFS TO THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Filed May 15, 1978

With respect to the present record, two matters asserted in the Brief for the United States require clarification. The first matter involves the requirements of the Georgia Code and actual voting practices in Rome. At one point it is stated: "However, in 1964, literacy tests were required by the Georgia State Code and the Code in effect in the City of Rome required that state law be followed in elections held in the City of Rome." Brief for the United States at page 29. "The record clearly reflects that state law as well as the Rome Code required the application of a literacy test as of November 1, 1964, and unless there is clear evidence to the contrary it must be assumed that the requirements of law were followed in the Rome area." Id. at page 41. Indeed, there is clear evidence to the contrary. The affidavits of the Secretary of the Rome City Commission, who served as the former voter registrar, and her assistant are unequivocal. The affidavit of Harry Johnson, municipal election superintendent, is likewise unequivocal. No literacy tests or other tests or devices to hinder registration were required in Rome. Similarly, the affidavits of all city officials charged with registration which have been submitted indicate that no tests were utilized. City of Rome Memorandum at pages 5-6, 59.

The Defendants have described the Plaintiffs' affidavits as "conclusory." As indicated in City of Rome Memorandum at pages 3-4, this Court has approved "undoubtedly self-serving affidavits" in Virginia v. United States, supra, at 1321. These affidavits are, in any event, not "conclusory" testimony but direct, uncontradicted, and sworn statements of fact that no such tests have been used for at least forty years in Rome.

The second matter requiring clarification involves the testimony of black citizens as to the use of any such tests. The Defendants make the following statements: "A number of the black persons who testified recalled taking a literacy test in either the county or the city." Brief of the United States at page 29. The cited authority for this assertion is the Edwin Tanner Deposition at pages 11-13 and the Fielder Deposition at pages 69-71. This is not the substance of either person's testimony. Mr. Napoleon Fielder stated: "I can't say that I had to take a test. I don't remember." Fielder Deposition at page 70. Mr. Fielder further testified that he successfully registered to vote by merely signing his name and giving his address. Id. Mr. Fielder concluded: "To my knowledge, there has never been any problem with registering, not in Rome -- not in Floyd County." Id. Mr. Fielder's comments with respect to tests seemed to be directed to the rest of the country, not Rome. Id. at page 69. Mr. Edwin Tanner testified that he first registered in Rome "close to thirty years" ago. Edwin Tanner Deposition at page 12. (The existence of separate registration for state and county elections and city elections caused some confusion in the memories of the witnesses. Id. at page 11; Fielder Deposition at page 71.) Mr. Tanner testified that he successfully registered at that time, and his recollection was clouded by the passage of this length of time. ("I don't know exactly, it's been some years." Edwin Tanner Deposition at page 11.) In any event, Mr. Tanner's testimony relates to a time period beyond the seventeen years required by the statute.

As to the relevant statutory period, the evidence in this record is uncontradicted as

to the use of any form of test or device. For this reason, presumably, Defendants have admitted that "the record does not directly reflect the extent to which the state-imposed literacy test denied black persons their right to vote... ." Brief for the United States at page 29. The record does not reflect this, because it did not happen.

To the extent that Defendants seek to taint the actual practices of the City of Rome with the provisions of the Georgia Code, their approach is directly contrary to that specified by the Supreme Court in Perkins v. Matthews, 400 U.S. 379 (1971). See City of Rome Memorandum at page 16. Plaintiffs also note that the Supreme Court in United Jewish Organizations of Williamsburgh, Inc. v. Carey, U.S. , 97 S. Ct. 996 (1977), carefully employed the word "used" in describing the literacy tests of King's, Brooklyn, and New York Counties in New York State. 97 S. Ct. at 1001, 1005. Defendants here simply ignore the word "used."

Defendants have directly admitted the lack of discriminatory purpose as to the annexations and have effectually admitted the lack of discriminatory purpose as to the political changes. Thus, the hypothesis of bloc-voting is essential to the Defendants' argument concerning the "effects" of the annexations and political changes. The hyperbole engaged in by the Defendants is, therefore, understandable. For example, Defendants assert that the record "demonstrates strong patterns of racial bloc-voting in Rome... ." Brief for the United States at page 3. This "strong pattern" is later elevated to an "inescapable conclusion." Id. at page 35.

This "inescapable conclusion" is founded on three items of evidence according to the Defendants. The first item includes the results of City elections in which black candidates have run. As to this item, the Defendants have condeded: "However, there are few City elections in which blacks have run, and, because of the limited data regarding the results of those elections, it is not possible for a statistician to analyze election returns and measure precisely the extent of racial bloc-voting." Id. at page 11. Thus, the Defendants acknowledge they must rely upon two other forms of evidence, the testimony of citizens in Rome who are knowledgeable about election practices and voting patterns, particularly in the black community, and the testimony of an alleged expert who described the results of one election in 1968.[6]

Plaintiffs acknowledged in their Memorandum that the witnesses took differing views as to the existence of bloc-voting by race. City of Rome Memorandum at page 57. The black citizens who served as witnesses were divided as to this issue. Compare Jackson Deposition at pages 53-55, 66-67, and Hill Deposition at pages 33-37, with Aycock Deposition at pages 19-20. According to Dr. Houser, blacks vote for the man running and not for the color of his skin. Houser Deposition at page 17. As Plaintiffs have set forth in their Memorandum, there have existed during elections in Rome at least three different "lists" circulated among the black community as to who

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[6] See pages 19-22, infra.

would serve as their best representatives. Jackson Deposition at pages 30-33, 49-53. See City of Rome Memorandum at pages 57-58. The County Voter Registrar and the Probate Judge-Municipal Election Superintendent testified that there was no bloc-voting by race in Rome. Johnson Affidavit; Harry Johnson Affidavit. The current City Commissioners, the former City Attorney, and the City Manager testified similarly. Harvey Deposition at page 65; Hunter Deposition at pages 17-18, 75; Wade Deposition at pages 12-13, 39-40, 43; Clary Deposition at pages 59-60, 81-85; Hamler Deposition at pages 120-121, 159-161. Plaintiffs will not repeat the points made in their Memorandum; however, in view of the significance of this issue in the context of the Defendants' argument, a number of additional aspects of the issue should be noted.

Some of the "evidence" put forward by the Defendants is puzzling. This is especially true in light of the clearly established recognition that mere failure at the polls is not evidence of a constitutional violation. Whitcomb v. Chavis, 403 U.S. 124, 153 (1971); United Jewish Organizations v. Carey, supra at 166. The fact that Mr. Samuel Stubbs lost in 1972 in his race for the Rome City Commission is said to have some significance. However, it is admitted that Mr. Stubbs, a Democrat, decided to run as a Republican. The Defendants attach no significance to this change of parties but seek to explain Mr. Stubbs' loss in racial terms. See Brief for the United States at page 15, n. 61. Furthermore, Mr. Stubbs was not and is not well known in the community. At least half of the black community did not know him; he was not a leader nor influential in the

black community. Jackson Deposition at pages 23, 57. Mr. Stubbs admitted that he had not been actively involved in politics before his campaign (Stubbs Deposition at page 17), and other testimony indicates that Stubbs did not do much campaigning at all. James Wright Deposition at page 17. Nevertheless, Plaintiff Hunter testified that he and his wife voted for Mr. Stubbs. Hunter Deposition at page 23.

Some of the "evidence" set forth by the Defendants is in direct contradiction of the record. Mr. Curtis Moreland, the black principal of Main Elementary, testified: "[W]hites will not vote for blacks. It's as simple as that... ." Brief for the United States at page 16. However, Mr. Moreland's comment has not been quoted fairly. It was apparently a general observation, and in the specific context of Rome politics, he admitted three pages later in his deposition that Reverend Clyde Hill received the support of white citizens. Moreland Deposition at page 13. Reverend Hill himself testified that he had the support of blacks and whites. He received invitations to speak at predominantly white civic clubs and churches. Hill Deposition at pages 17-18. He described his support from white citizens as "good" during his campaign. Id. at page 28. He also testified that he received political contributions from white citizens, and he identified the person who donated his political cards as being white. Id. at pages 36-37. See also James Wright Deposition at page 54. Mr. Harvey, a white and current member of the Rome City Commission, testified that he encouraged Hill to run and supported him. He gave Reverend Hill money and campaigned for him. Harvey Deposition at page 26. Mr. Harvey also testified that he

campaigned for Hill and caused some voters to support him. Id. at pages 30, 57. He testified that he personally voted for Mr. Hill and that a substantial number of his friends and family also voted for him. Id. at page 29. Plaintiff Hunter testified that Reverend Hill had the support of the majority of the City Commission. Mr. Hunter testified that he also voted for Reverend Hill and gave Reverend Hill some money. He testified that his wife voted for Reverend Hill and that he personally knew that at least two-thirds of the members of the City Commission voted for Reverend Hill. Hunter Deposition at pages 21-22.

The only "inescapable conclusion" that is presented by the record is that the current political leaders in Rome, who are white, supported the person designated by the Defendants as the most viable black candidate to have run in Rome. It is not unusual, as the record indicates, in the context of Rome politics, for an individual to run for office several times before he is elected. Wade Deposition at page 15. Mr. Wade, a current member of the City Commission, and white, ran four times before he was successfully elected. Id. at pages 6-7. Reverend Hill was not elected because he was not well known. Harvey Deposition at pages 26-27. Mr. Wade explained that Reverend Hill lost for the same reason that Wade lost his first couple of attempts at elective office, namely, lack of exposure. Wade Deposition at page 15. Apparently, Reverend Hill had been in Rome for about three years at the time of his campaign (Aycock Deposition at page 50), and Dr. John Houser described Reverend Hill as a "relative newcomer." Houser Deposition at page 21. Reverend Hill himself admitted that he was not

well known at the time of his campaign (Hill Deposition at page 19) and other testimony shows that he was then about 23 or 24 years old. Jackson Deposition at page 58. In fact, it was recognized that Reverend Hill did not actively seek votes from whites. Aycock Deposition at pages 15, 31-32, 61; Thomas Deposition at pages 21-23. Plaintiff Hamler testified that Reverend Hill did not receive active and substantial black support (Hamler Deposition at pages 120-121, 159-161); although he did have the support of a majority of the then City Commission. Hunter Deposition at pages 19, 21.

The other candidacies which have significance, according to the Defendants, are all actually indicative of the lack of bloc-voting by race in Rome. Mr. Whatley, according to the Defendants, ran for office sometime in the 1950's. There is no official record of his having run, and few people recall the details of his campaign. Brief for the United States at page 12 n. 33. "[H]is campaign failed to arouse much interest... ." Id. at page 12. Dr. Houser himself noted that politics was not necessarily his "bag at all." Id. The head of the Voter Education Project indicated that Dr. Houser did not have black or white support. Jackson Deposition at page 23. Jackson testified that Dr. Houser didn't make too much effort to be elected. Id. at page 57. However, as indicative of the lack of bloc-voting even in this context, Dr. Houser testified that some whites voted for him when he ran. Houser Deposition at page 17.

The candidacy of Mr. Edwin Tanner for Justice of the Peace receives attention from the Defendants. However, they failed to note

the significant testimony in this regard of the persons that they have described as "experts" with respect to political affairs to the Rome black community. He has been described as not being a qualified individual to run for public office, who lost for reasons other than the fact that he was black. Fielder Deposition at page 60; Carmichael Deposition at page 25. See also James Wright Deposition at page 16.

The Defendants give significant attention to the fears articulated by Mr. Elgin Carmichael, a black incumbent member of the Rome Board of Education, who was appointed to his position, to the effect that he could not be elected to the same position. Brief for the United States at page 16. Obviously, any testimony of this type is speculative, but this is not Mr. Carmichael's testimony. The quoted portion of his testimony in the Defendants' Brief is directly supportive of the Plaintiff's position. "I don't think I would have 100% of the black vote... . I think I would get a sizable amount of the white vote, but I don't think I would get enough white votes to give me enough to win, even though, as I say, I am very popular, and I have always tried to carry myself in a way that I was respected and I respect my people." Carmichael Deposition at pages 15-16. Mr. Carmichael himself indicates that he would not get all of the votes of black citizens and would receive substantial white votes.

The evidence with respect to bloc-voting in Rome is inconsistent with the government's position. It is totally consistent with a political atmosphere that was diverse, active, and undergoing change until stultified by the

Department of Justice.[7] It does not approach the racial cleavage in voting that is normally deemed to constitute bloc-voting. Note, United Jewish Organizations v. Carey And The Need To Recognize Aggregate Voting Rights, 87 Yale L.J. 571, 599 n. 148 (1978).

The final type of evidence of the existence of bloc-voting put forward by the Defendants is the "expert testimony of a political sociologist who has described the results of

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[7]The Defendants clearly do not understand the political dynamics of Rome, but rather have imposed pre-conceived, general concepts of racial polarization upon this concrete set of facts. For example, the Defendants assert: "It is an established fact that very few voters in Rome are Republican... ." Brief for the United States at page 15. However, it is also established that six of the nine current members of the City Commission are Republican. Commissioner David Harvey described how his minority group, Republicans, came to power. They sought to "be better organized, be more attractive, work harder, be more efficient in (their) use of...limited funds...and ...appeal to the community as a whole and not just the traditional Democratic office holders and political machine... ." Harvey Deposition at pages 17-18. A critical aspect of this effort was appeal to the black community. "I spent probably 50 percent of my total campaign time in the black community, although it only represents numerically at best 23 to 24 percent of the entire community I would say, and it was -- it was productive." Id at page 22.

one election, conducted in 1968, in which a black candidate opposed a white candidate and which, because a number of polling places were utilized, is of statistical significance." Brief for the United States at pages 12, 17-19, 25. In Plaintiffs' Memorandum it was noted that Plaintiffs would challenge the admissibility of such testimony for any purpose. City of Rome Memorandum at page 58 n. 13. Plaintiffs do so at this point and hereby object to the testimony and the opinions of Dr. Loewen as "guesswork and speculation." Polk v. Ford Motor Co., 529 F.2d 259, 271 (8th Cir.), cert. denied, U.S. , 96 S. Ct. 2229 (1976). For the testimony to be admissible, the matter must be closely related to the particular science examined and a matter of common knowledge, and the witness must have skill and knowledge so that his opinion rests on a substantial foundation and would tend to aid the establishment of the truth. Bridger v. Union Railway Company, 355 F.2d 382, (6th Cir. 1966). Dr. Loewen failed to meet these criteria, and it is interesting to note what he did, as well as what he did not do, in arriving at his opinion.[8]

Although Dr. Loewen was deposed by Defendants to testify as to the existence of bloc-voting in Rome, he opined concerning the wrong political unit, to-wit, Floyd County rather than the City of Rome. Loewen Deposi-

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[8]It is regrettable that the Court could not observe the actual demeanor of this witness in testimony; however, Plaintiffs respectfully refer the Court to the entire contents of his disposition.

tion at page 15. This is indicative of the knowledge of the witness to be examined and the foundation for his testimony under the above test. Furthermore, Dr. Loewen, although knowledgeable about Mississippi, was totally unfamiliar with the history, demography, racial makup and government of the State of Georgia, the County of Floyd, and the City of Rome. Id. at pages 20-23. He was totally unaware of any history of racial discrimination in Floyd County and Rome. Id. at page 22. He was totally unaware of the population of Floyd County and Rome. Id. at page 25. He did not know but "guess [ed he] would conclude" the percentage of blacks in Rome to be 28% and Georgia to be 26% (id. at page 25); nevertheless he admitted that such percentages and concentrations "certainly might" make a difference in his opinion. Id.

The election that Dr. Loewen analyzed was the 1968 Democratic primary for the United States Senate between the incumbent, Herman Talmadge, and Maynard Jackson, who now serves as Mayor of the City of Atlanta. He was uncertain who was the incumbent in the Talmadge-Jackson election, although he admitted that incumbency was an important consideration. Id. at page 30. We ask the Court to take judicial notice of the fact that Senator Talmadge had served as United States Senator from Georgia for twelve years at the time of the 1968 election and that he is a member of one of the leading political families in the State of Georgia. Dr. Loewen did not know about, or investigate, the political clout of the incumbent's opponent, Maynard Jackson, who was making his first run for public office in 1968. Id. at pages 31-33.

He did not know about, or investigate, campaign participation of blacks in the

City of Rome. Id. at page 51. He did not know how population was dispersed in the incorporated and unincorporated areas of Floyd County (id. at pages 42-43), nor which voting districts were in industrial or agricultural areas (id. at page 47), although he admitted that they "might make a difference" (id. at pages 47-48), as could different issues and offices. Id. at page 48. Summarily, Dr. Loewen testified, "Those factors could make a difference. I could be wrong." Id. at page 49. He did not know nor investigate political party activity in Rome, although he acknowledged that it could affect his opinion. Id. at page 52. He did not utilize the figures of any election other than the 1968 senatorial race, although there were others in which figures from different voting districts were available (id. at pages 36-37, 39), and those easily might have made a difference. Id. at pages 39-49. He did not consider any registered voter figures nor voting age population figures. Id. at pages 53-54, 59. He did not consider any of the depositions or evidence other than bare statistics in the case (id. at pages 56-57), nor any information about or history of registration and voting by blacks in the City of Rome. Id. at page 60. When Dr. Loewen made one of his analyses, he did not include even one of the five districts in the City of Rome, although that was the political unit about which he was to opine. Id. at pages 13-14, Exhibit 4. Indeed, Dr. Loewen could not identify all of the five city districts. Id. at pages 43-44. For the 1968 election analysis, he utilized the 1970 census figures supplied to him by another government witness, without making any adjustment for events and trends in the intervening years. Id. at Exhibits 2 and 3; John Tanner Deposition at pages 18-20.

Dr. Loewen's testimony with respect to "correlation coefficients" which noted a "very high, very strong relationship between white population and the voting white" (id. at page 11) simply failed to take into account the identity of the candidates in the 1968 race, which he examined. In contrast to the "correlation coefficient," the "overlapping percentages method", and the "Goodman-Ecological Regression" method, is the sworn testimony of white voters in Rome that they voted, with their family and friends, for black candidates. Furthermore, it is a fundamental principle of statistical analysis that correlations of coefficients do not show causation, and causation is the sine qua non of a finding of "effect". In fact, Dr. Loewen summarizes his results by stating that "I cannot state with certainty that Rome, Georgia, in every election since 1968 or from 1978 through 1988 will racially bloc-vote." Id. at pages 49-50. The Plaintiffs submit that no weight is to be given to any part of the testimony of Dr. Loewen or to any of his methods of hypothesizing the existence of racial bloc-voting in Rome.

The lack of evidence of the existence of racial bloc-voting in Rome indicates that the Plaintiffs are entitled to preclearance of the annexations and political changes before this Court, because such annexations and political changes could not have had the effect of discriminating with respect to the right to vote.

A. The Electoral Changes And Annexations Were Not Enacted With A "Purpose To Discrimate" And Should Be Precleared By This Court.

The Defendants have admitted that no discriminatory purpose exists with respect to the annexations. "(T)he record does not support a finding that the annexations were the result of a discriminatory intent... ." Brief for the United States at page 39.

The Defendants have also admitted that they have made no finding with respect to any discriminatory purpose of the electoral changes. "(T)he actual purpose of the electoral changes is unclear on this record." Id. at page 25. "Once again, the record does not reflect precisely why these provisions were adopted." Id. at page 27. Actually, Plaintiffs believe that Defendants have not fairly treated the evidence with respect to this issue. As Plaintiffs indicated in their Memorandum, the former City Attorney indicated in a letter to the City Commission that the "one man-one vote" requirement of Reynolds v. Sims, and related cases, required the electoral changes. See Private Plaintiffs' Memorandum at page 3. Without mentioning this letter, the Defendants have argued that since the other reason given by the former City Attorney for the changes was a mistaken belief that a majority vote requirement was required by Georgia law, some "inference" of discriminatory intent can be made. Even if the reason was incorrect, it was a belief genuinely held and non-discriminatory in nature.

Apparently acknowledging the lack of direct evidence with respect to this issue, the Defendants have fallen back to an "inference" of discriminatory intent, citying United States v. Texas Education Agency, 564 F.2d 162, 168 (5th Cir. 1977). Brief for the United States at

page 39. This, Plaintiffs urge, is not the appropriate test for determining an unlawful purpose, under the plain language of the Supreme Court in Wright v. Rockefeller, supra, Washington v. Davis, supra, and Village of Arlington Heights v. Metropolitan Housing Development Corp., supra. However, in the present case there is no room for the use of any such "inference", because the absence of discriminatory purpose is established by direct evidence and logic.. (For example, numbered posts follows as a mathematical certainty from the reduction of the number of wards from nine to three, which the Attorney General precleared as to Plaintiff City of Rome.)

B. The Electoral Changes And Annexations Do Not Have The Effect Of Abridging The Right To Vote On Account Of Race Or Color And Should Be Precleared By This Court.

The only "effect" to which the Defendants have pointed with respect to the electoral changes, is the race of Reverend Clyde Hill. This issue is discussed extensively above, but Plaintiffs would note further that Reverend Hill, according to the stipulated facts, received 48% of all votes cast in his run-off election, and under the stipulated facts, only 15.5% of the registered voters of the City of Rome at the present time are black. Also, as Plaintiffs noted in their Memorandum, the black witnesses testified that the current political leadership in Rome is very responsive to their needs. City of Rome Memorandum at pages 6-8, 57-62. This is in direct conflict with the assertion by the Defendants that "(t)he electoral changes...have the effect of depriving the black community of

adequate representation on the Rome City Commission and Board of Education." Brief for the United States at page 21. A black witness has indicated that the cooperation was more than "adequate;" it was the "ultimate." Moreland Deposition at page 40.

The "effect" of the annexations described in the Defendants' Brief is very difficult to discern. Of the thirteen annexations before the Court, nine of them contained no voters of at the time of annexation. Brief for the United States at page 22. The manner in which these annexations could have abridged the right of black citizens to vote, especially when no reliable forecast could be made of the eventual racial composition of the areas, is impossible to discern. It must be presumed that housing in these areas, as they grew, would be subject to the requirements of law with respect to non-discrimination. Thus, it is impossible to impute a discriminatory intent to the annexation of such barren geographical districts. Three other annexations, Homes Acres, Lyons Drive, and the Battey Hospital contained a total of 47 registered voters, at the time of annexation, all of whom were white. Id. With respect to these annexations as well as all annexations, Plaintiffs have indicated that no discriminatory intent was present in the actions. However, clearly these annexations would be de minimis in the context of a community which contains 13,000 voters. With respect to the Old Airport Community, the intent for annexation has been clearly established in Plaintiffs' Memorandum. This was an unincorporated "island" in the middle of the City of Rome, which did not have sewerage and which was "forced" upon the City of Rome by the Floyd County delegation to the Georgia General Assembly. City of Rome Memorandum

at pages 53-54. Defendants have made no showing that these small annexations, the natural functions of a growing city, were discriminatory in nature.

(Remainder of Pleading Omitted in Printing)

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EXCERPTS FROM DEPOSITIONS

Deposition of Bruce Hamler

Direct Examination

By Mr. Brinson:

[4] Q. And when did you become City Manager of the City of Rome? A. 1961.

[29] Q. All right, sir. I want to address myself to the 13 [30] annexations that remain objected to in the City of Rome and ask you to recall, if you will, those annexations? One is described as Saddle Mountain-Dupree and it was effected April the 8th, 1965. Do you recall that? A. Yes, I do.

Q. Generally at least? A. Yes, I do.

Q. Was that annexation, did that take place by Ordinance of the City of Rome or by legislative action? A. It took place by legislative action.

Q. Do you have any idea what was the population of the area as of that time? A. There were very few houses there. I guess it could have been ten, maybe twelve.

Q. All right, sir. Was -- what did the -- did the area consist of just the area where those ten houses were or was it a larger area or --A. It consisted of a larger area of -- of vacant lot land, vacant lots.

Q. All right, sir. How about Holmes Acres, East Eleventh Extension? How did -- did that take place by ordinance or legislative action? [31] A. Holmes Acres was taken in by legislative action.

Q. All right. Was -- what, as you recall, was the population of that area at the time of the annexation? A. It could have been -- maybe 15. I believe there was a house or two more there than it was on Saddle Mountain but not many, not too many. That was mostly vacant lots.

Q. All right, sir. How about Lyons Drive, West Rome on Alabama Road which was also taken in April 8th, 1965, was that by ordinance or legislative action? A. I believe Lyons Drive was taken in by ordinance.

Q. And do you remember the population of that area? A. That might --let's see, that was just one street mostly on one side -- maybe 20. I'm just guessing.

Q. Was there any vacant land or not? A. Yes, there was. There were vacant lots there.

Q. All right. A. They mainly wanted to come in because of no sewerage and they just really couldn't do much building there until they did get some city sewerage.

Q. Well, while we're at it, -- let's back up a minute -- what was your understanding of the reason for the request to annex Saddle Mountain? [32] A. They had a very poor water supply at that time that -- they were on the county system, and they had a very poor water supply. In fact, they didn't have much water at all, and they didn't have any sewerage, and so they --they wanted the city to give them sewerage and that was one of the main reasons, plus they needed to get their water supply improved.

Q. When you said they, do you mean the developers? A. The developers.

Q. And the owners? A. And -- and the owners. Right.

Q. All right. What about Holmes Acres, East Eleventh Street? A. The same -- the same thing would be true of Holmes Acres.

Q. To obtain city services? A. Right.

Q. And Lyons Drive? A. Same thing.

Q. To obtain city services? A. They did have city water, but they were in bad need of sewerage.

Q. Were there any alternatives to the sewerage services? [33] A. Not -- no, not -- the only way they could go would be in the city.

Q. Why is that? A. Well, because of the terrain and the fact that we were the only ones that had the system.

Q. Did the unincorporated area of Floyd County have any sewer system? A. No, they did not.

Q. What was the alternative to public sewer? A. Well, the way the state was enforcing the septic tank ordinance, they really didn't have too much because some of that land just wouldn't percolate when -- you know, they just wouldn't have been able to develop if they hadn't had city sewerage.

Q. Okay. Another annexation is the Georgian and Old Salem Apartments, April 18th, 1966? A. that was vacant land.

Q. It was vacant land? A. Yes.

Q. Were there any apartment buildings on it? A. No, Sir.

Q. What was their reason for annexation? A. They had to --

[34] Q. Or request for annexation? A. Have city sewerage and water and fire protection.

Q. Battey Hospital was annexed February 20th, 1967. Was that already developed or undeveloped? A. That was already developed.

Q. And what was the reason for annexation there, do you remember? A. The state owned that property, and they --

Q. State of Georgia? A. Yes, sir. And they had had a real bad experience with law enforcement problems in the area out there

and, as I recall, they -- well, they met with us on two or three occasions and asked that that be taken into the city.

Q. In order to provide them police protection? A. Right. Yes, sir. And also there was a problem that they wanted their children to go to school, too, and they had bus service.

Q. Can you generally describe this Battey Hospital area? Is it a development? A. Well, it's not really a development. It's a hospital with --I guess there may be ten or twelve residences there where the doctors live, and most of the personnel though that work out [35] there live off the site, but there are some homes out there for the doctors and I assume maybe some nurses. The fellow that's in charge out there, I believe he -- he did live here, but mostly the area is -- is a hospital and they've not, you know, -- they've got a generating plant out there and they've got a swimming place and they did have a fire department, and that's another reason -- that's one of the main reasons because they was maintaining a separate fire department out there and it was costing the state a good bit of money, and we were located nearby and they wanted to take advantage of our fire department.

Q. All right. Maplewood Square was annexed May 1st, 1967. What was the nature of that at the time -- A. Vacant land.

Q. Vacant land? A. Yes, sir.

Q. Was it to be a subdivision? A. Yes, sir.

Q. Why was or what was the reason for the request for annexation? A. They had to have sewerage also, and we had a trunk line extended up there to that area.

Q. Now, as to each of these I'm asking you, do you make [36] it your business to know the reasons for annexation? A. Yes, sir.

Q. And whether or not annexation is justified? A. Yes, sir.

Q. Garden Lakes-Rollingwood area, September 5th, 1967? A. That was vacant land.

Q. Was it accomplished by ordinance or legislative act? A. I believe ordinance.

Q. Was Maplewood Square accomplished by ordinance or legislative action? A. Ordinance.

Q. Was Battey Hospital accomplished by ordinance or legislative act? A. I'm -- I'm not going to be able to tell you. I don't remember. I believe it could have been legislative act.

Q. How about the Georgian Apartments, was that by ordinance or legislative act? A. I think that was by ordinance.

Q. All right, sir. Berkshire Estates was annexed February 19th, 1968. What was the nature of that at the time? A. That at the time was vacant land.

Q. Was it annexed by ordinance or legislative act? [37] A. I believe by ordinance.

Q. What was the purpose given you for the request for annexation? A. They needed water and sewer, fire protection.

Q. And was it in order that these areas be developed? A. Developed, yes, sir.

Q. When they asked for city services? A. Yes, sir. I might just interject one thing to clarify -- it's very hard -- difficult to get the state to approve any kind of subdivision nowadays that doesn't have a public sewer, and by that very reason that anything that's developed around the city is generally -- they ask to come in because they need it. They almost have to have it to -- to develop, even though it may be vacant land at the time, that's -- that's I think the main reason why most of these people, plus the fact that get much less water rates and so on, 50 percent of their --

[39] Q. All right, sir. Now, at the point we diverted a little bit, we were at Garden -- no, we weren't we were at -- A. Berkshire.

Q. Berkshire Estates. The next annexation is W. A. Dupree-Rockmart Road, February 16th, 1970. Was that accomplished by ordinance or legislative act? A. Ordinance.

[40] Q. And is that -- I'll ask you to describe that annexation? A. It was vacant land.

Q. Is it part of the -- A. To be developed.

Q. Saddle Mountain development? A. It is now. It is now, yes.

Q. What was the reason or the purpose for that annexation? A. They needed water and sewer.

Q. Next is Westminister Apartments, Harry Butler, May the 4th, 1970? A. That was vacant land.

Q. And what was the reason for that development? A. Same reason. He had to have sewerage and water.

Q. Was that accomplished by ordinance or legislative act? A. Ordinance.

Q. All right. Castle Cove Sub -- Castle Cove Subdivision area, February 15th, 1971. Was that by ordinance or legislative act? A. I believe that was ordinance.

Q. And what was -- [41] A. Now, my memory may not be perfect on all of these annexations, but I believe that that was ordinance.

Q. I understand that. A. If I miss them, you'll just have to tell me, but I believe that was an ordinance.

Q. All right, sir. What was the nature of that annexation or the reason for it? A. That was -- that was just -- just open land, undeveloped land.

Q. And what was the reason for the request for annexation? A. Sewerage and water and fire protection.

Q. Saddle Mountain No. 4, Bill Dupree? A. That's an extension, that would be the same thing. That was by ordinance and

I think the last that was brought in on that area was by ordinance. The first, of course, was by the state, but they needed sewerage and water there too.

Q. In order to -- A. To extend that on out.

Q. Continue development? A. Right sir.

Cross-Examination

By Ms. Jones:

[136] Q. Okay. And you also stated -- well, when these areas were annexed, could you say that they were annexed with a view [137] towards increasing the total population of the City of Rome? A. That and -- yes, and the tax digest.

***

[157] Q. Okay. Mr. Hamler, you stated that the City of Rome hasn't conducted an election in about the past four years. Is that what you stated? Are you aware that -- A. It's my -- excuse me -- it's my --if I -- it may be, you know, I just -- three of the people on the Commission would have -- would have been due to be elected two years ago and six of them are due to be elected this year.

Q. This year? A. And they were elected for four-year terms, the four--the six that are due to be elected and there are three that are [158] past due to be elected.

Q. Okay. You stated that the reason could be -- well, in your opinion, was because of the changes that had been objected to by the Attorney General? A. It was my understanding from Mr. Brinson that if we held an election and had gone to the expense of having an election that the chances I guess were probably 100 to none that we would -- that they would not be approved, that the election would not be approved.

Q. Are you aware that the City of Rome was free to conduct elections as long as they did not implement the new changes? A. You mean the new changes that were made in '50 --

Q. That were objected to? A. Oh, the new changes in the annexations?

Q. And in the electoral system? In other words, that the City of Rome -- A. Back when it was changed in '56?

Q. No. A. I mean '66?

Q. Right. A. Was I aware that we could have had one of the old --

[159] Q. Under the old system, that Rome elections would have been deemed proper? Are you aware of that? A. I'm not aware of that.

***

Q. You also stated that in your opinion that there is no voting in Rome by race. In other words, the white voters vote

for candidates and not for white candidates, and the black voters vote for candidates and not black candidates. What do you base that opinion on? A. The only way I could base that opinion would be on -- opinion -- the discussion I heard when Rev. Hill run that at the time he was running in the run-off that very few blacks came to vote, and I know of a good number -- I'm going to be honest.

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Deposition of Horace Clary

Direct Examination

By Mr. Brinson:

[6] Q. All right. Now, what other public offices have you held in Floyd County or the city of Rome? A. For 19-1/2 years I was City Attorney -- up until you took over in 1968.

***

[54] Q. All right, sir. Another change that was accomplished in 1965 was going from a plurality to a majority vote. If you will, please describe why you made that recommendation? A. Well, I had no choice in that unless I ignored the Georgia Election Code. In the meantime, Georgia passed many laws pertaining to elections and the Georgia Code very specifically [55] said it had to be by majority vote, and I had to put that in.

Q. Did you feel that the State Election Code would apply to the City's? A. Yes, I did. I knew it did.

Q. And at that time the city of Rome had a plurality vote? A. Yes. And it didn't matter to us about it. I was just -- put it in because the Georgia Election Code said I had to.

***

[56] Q. All right, sir. Now, let me ask you a series of questions. In connection with your recommendations to the City Commission and the representatives of the city of Rome -- I mean representatives to the State Legislature and/or from your observation of the passage of these changes, was there any racial motivation in connection with any recommendation you made or any change that you observed in connection with the change in the ward configuration? A. No, sir. Absolutely not.

Q. Was there -- A. Now, I will say this. I wasn't so stupid that I did not recognize the fact that - why the Georgia Legislature said it had been a majority, had to be a majority vote --but I had no choice on that if I followed the Georgia Law to get the thing passed, if they said it was majority, I knew why they did it, but I didn't think it mattered at all to the city of Rome, and I knew nothing would change anything. As I say, at that time and still today, the best of my knowledge, Mr. Bruce Hamler and the Commissioners have the 95 percent approval of the black voters, so I would have done nothing certainly to have diluted their vote or -- in any respect.

[57] Q. All right. Was there any racial motivation in the change from plurality to majority? A. Well, if it was, it was because it didn't -- frankly, it didn't even matter to us.

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Cross-Examination

By Ms. Jones:

[69] Q. Were you aware of your obligation under Section 5 as City Attorney for the city of Rome? A. I didn't even think about it. As I say, I knew about it from reading it in the paper, but what I was thinking about was that certainly what I was doing had nothing to do with any federal law about discrimination or anything because I'm -- ask anyone --I'm the last person in the world they would call a racist in the city of Rome. I felt like if we did what was right, we had nothing to worry about from anybody.

Q. So in other words, that's the reasons why the changes [70] that were adopted weren't submitted -- A. Right.

Q. Because of your views about the act itself? A. That's right. I felt first that it was unconstitutional. I still think so in spite of great legal scholars, and, second, I interpret the law to say if we did something to discriminate against the blacks, certainly action should have been taken, but I knew this did not.

***

[77] Q. Okay. You stated that you recommended the majority vote requirement because you had no choice according to Georgia law? A. That's right. And, of course, Georgia's position on that is that we had some counties and some cities that had majority vote, some of them had a plurality. I personally am for the majority vote. Georgia tried to make it uniform throughout the state. I agree with it.

Q. But didn't the law say that if you had a plurality, this majority vote requirement does not apply to your cities that have --A. I have forgotten -- I haven't checked the law since I [78] wrote that --

MR. BRINSON: Now, wait, I'm going to object to the form of the question because -- Carmen, I'm not -- you may be right as to the Georgia Election Code, but let's not confuse the Georgia Election Code and the Georgia Municipal Election Code which was not passed until 1968. Now, if -- the witness can of course state what he knows about the Georgia Election Code which was passed in '64, but I don't want to -- now, I don't know -- I don't know because it doesn't specifically say that it applies to cities in the Georgia Election Code, but if it says -- had a plurality situation -- did it? Let me ask you that?

MISS JONES: What, did Rome?

MR. BRINSON: Did the '64 Code say that if there was a plurality -- existing plurality system --

MISS JONES: I'm sorry. I was speaking about the 1968 Municipal Code.

MR. BRINSON: Oh, okay.

MISS JONES: I thought that's what Mr. Clary was speaking of.

MR. BRINSON: No, this was -- A. No this was passed before the --

Q 40. Okay.

MR. BRINSON: This was the Georgia Election Code at [79] which time there was no Municipal Code.

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Exhibit "1"

CITY OF ROME
ROME, GEORGIA
July 6, 1965

Horace T. Clary
Attorney
Parker, Clary & Kent

Mr. S. L. Hancock, Chairman
Rome City Commission
Rome, Georgia

Dear Mr. Hancock:

Several days ago you asked me whether or not I had given any consideration to a matter that has been discussed by the City Commission on many occasions during the past few years as to the changing of the Wards within the City of Rome.

I might state that the Charter of the City of Rome allows the City Commission to change the number and composition of the Wards of the City, but I believe that there should be legislative action by the General

Assembly to change our Wards as during my tenure of office I have added to the Acts of the General Assembly that incorporated other property into the City a statement to the effect that each piece of property would specifically become a part of a certain Ward of the City of Rome. That being the case, I believe that the Legislature would have to make any changes in the composition of the Wards.

I know you understand that this is simply a tentative suggestion on my part and would require much study by the City Commission and our Legislators before any change is made.

I believe that for the best representation for all of our citizens the City of Rome should be divided into three (3) Wards, which, for the purpose of simplicity, I will designate as Ward 1, Ward 2, and Ward 3.

Ward 1 would consist of all of the City of Rome lying between the Etowah River and the Oostanaula River. Ward 2 would consist of all that property lying between the west line of the Oostanaula River and the Coosa River. Ward 3 would consist of all of the property lying between the Coosa River and the Etowah River.

In other words, Ward 1 would consist of our present Wards 1, 2, 3 and 6. Ward 2 would consist of our present Wards 4 and 9. Ward 3 would consist of our present Wards 5,7 and 8.

I have checked with Mr. Sid Thomas and his study indicates that the population in these three Wards would be almost equal.

I suggest that three (3) Commissioners be elected from each Ward, which will cause the Commission to remain numerically the same as it is today. I feel that the number of Commissioners should not be reduced as the terrific amount of committee work that must be done by the Commissioners require at least nine.

I feel that in each Ward there should be three (3) seats to be known as Seat No. 1, Seat No. 2, and Seat No. 3.

At the next election in 1968, I suggest that those persons seeking to be elected to Seat No. 1 in each Ward run for a term of two (2) years. Those persons seeking Seat No. 2 would run for a term of three (3) years, and those persons seeking Seat No. 3 would run for term of four (4) years. After the original 2, 3, and 4 year terms, each Commissioner thereafter, regardless of the Seat No., would run for a term of four (4) years. By doing this, there would be a continuity in government, which is generally agreed is of the utmost importance to a governmental body.

I feel that all of the citizens of Rome should vote for all nine (9) of the Commissioners as is done today. By so doing, each Commissioner feels that he represents all of the City of Rome and not any one particular Ward. In addition, by so doing, we automatically eliminate what is commonly known as "Ward heelers".

In addition to my mentioning the different setups of the Wards, I would like to call your attention the fact that I deem it of the utmost importance that our City Election Laws be modernized and brought into line with the Georgia Election Code as passed in 1964 by the General Assembly of Georgia.

I stand ready at your direction to prepare the proper legislation concerning both the new setup of the Wards and the election laws to be presented to the Legislators requesting their approval thereof.

Yours very truly,

/s/
HORACE T. CLARY
City Attorney

HTC:sh

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Deposition of C. W. Aycock

Direct Examination

By Ms. Jones:

[2] WHEREUPON, C. W. AYCOCK, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION

By Ms. Jones:

Q. Would you state your full name? A. My name is Charles W. Aycock. I usually sign it as C. W. Aycock.

Q. What is your present address? A. 319 East Fifteenth Street, Rome, Georgia.

Q. What is your date of birth? A. February 14th, 1909.

Q. Where were you born? A. Rome, Georgia.

Q. What is your race? A. Negro.

***

[14] Q. With respect to -- based on your activities in the black community, what are some of the things that black candidates do in their campaigning? Where are some of the places that they go? A. Well, the blacks -- I suppose it was a natural thing -- I think they concentrated more on natural places of congregation of blacks, which in this community would be the churches perhaps mainly. So I suppose you could single out the churches as the main places that the black candidates went and, of course, the black organizations, such as the National Association of the Advancement of Colored People, organizations of that kind.

Q. Did they confine their activities mostly to the black organizations -- excuse me -- the black churches and -- A. (Interposing) I would say they largely confined their efforts to that.

Q. Why was that? A. I suppose it was because they felt that was the only place [15] they would get real response --any response that would be effective.

Q. Did they campaign at all in the white community? A. I would say that that was negligible compared to the campaigns that they carried on in the black community.

Q. Were they ever asked to come to white churches or white organizations to campaign? A. Not to my knowledge.

Q. What do you think the response would have been if they had campaigned in the white community? A. I don't know, of course, what the response would have been. But from past performance, I assume that the whites would have largely voted for the white candidate.

Q. Do you recall whether or not Reverend Hill's activities during his campaign were confined largely to black organizations, black churches? A. Well, yes, it was confined largely to black organizations, black churches, places where you would expect large concentrations of blacks.

Q. Did he campaign at all in the white community, or do you know? A. I wouldn't say that he campaigned enough to say that it was considerable. I would say the greater part of it was in the black community.

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Q. How did Reverend Hill fare in the election that year? [16] A. He fared very well. In fact, he had a plurality. There were more than two people running. The others were white. Hill had the largest number of votes from the area from which he was running. But he did not have a majority; he had a plurality. And so he was not declared elected. They had to have a run-off.

Q. So what happened in the run-off? A. Well, in the run-off naturally they had the two highest vote-getters. And he lost in the run-off. He made a good showing, but he lost.

Q. What do you mean "he made a good showing?" A. Well, I mean by that that the blacks that had voted for him in the general election -- the regular election -- probably those same blacks, by and large, voted for him in the run-off. But he fell much further behind in the run-off -- well, he fell behind in the run-off. He was ahead in the regular election.

Q. Do you know how much white support he received in the general election. A. I would say it was very small. I would assume there was a very small, very negative amount of white support. Probably the greatest support came from blacks.

Q. What about in the run-off? How much white support did he get in the run-off? A. I don't assume that he got anymore than he got in the regular election, plus the fact that there was a scattering -- there was a multiplicity of white candidates in the regular [17] election. And I assume that most of the --

those who voted for the various white candidates probably voted for the remaining one white candidate, which completely over --

Q. (Interposing) Why was that? A. I suppose it was a natural voting pattern that had been developed. Blacks voted for blacks or for candidates that the blacks had endorsed, and whites voted for whites. And perhaps they concentrated on that one remaining white candidate.

Q. Do you know what the numbers of votes who were black voters who had registered before Reverend Hill ran for office or up until the time he ran? A. No, I don't know the number. No. All I could say about that is -- it would be going beyond your question -- would be that perhaps his candidacy created a lot of interest among blacks, and perhaps we had many more that registered and became qualified to vote and did vote.

Q. Why was their interest increased? A. I would say because they had a person that they felt perhaps had the best chance up to that time of actually being elected, and so they were just interested.

Q. Do you happen to know what the registration of blacks is at the present or since that time? A. No. I am sorry to say I don't know the exact figures.

Q. Do you recall what the turn-out was of the black voters at the election? [18] A. At the time that Hill ran?

Q. Uh-huh. A. I don't know the exact numbers, of course, and I don't know whether it was kept in that way. But the turn-out was, I would say, excellent, very good.

Q. How would you compare it to past years? A. Well, there was no comparison over the past years. It was very much improved over the past years -- much more interest.

Q. And since that election, how would you describe the black voter turn-out at elections? A. I would say it has gone down. The interest has decreased.

Q. To what do you attribute that? A. Well, to the fact that nobody has been elected, including Hill, who actually had more votes than anybody else, and it just dampened the people's spirits.

Q. Why is that? A. They didn't feel like anybody was going to be elected anyway, so the rank and file just didn't have the interest to go out and register and vote. They were registered, but they didn't vote.

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[19] Q. And why haven't you run? A. Well, two or three reasons. Number one, I was working for the City of Rome. And in most cases you just don't become too involved politically while you are working for the City. Number two, I suppose I had the same feeling that most blacks had and still have, that it would just be, oh, an activity in futility maybe.

Q. Why is that? A. Because of the system, having to run at-large. There would just be no way -- almost no way of being elected.

Q. Why? A. Because of the majority system and running at-large and the low percentage of blacks to the entire population in this area. The number just wouldn't be sufficient.

Q. In other words -- well, you mentioned that the majority vote requirement would hinder your chances. A. Right.

Q. Why is that? A. Well, that's a number thing there, just plain arithmetic, that you are going to have to get the majority of the votes of the whole city. And the majority of the people are white. Logically, it would just mean that the majority of the votes [20] would be white, and they would be for a white candidate.

Q. How do you know that? A. Past experience proves that. Blacks vote for blacks or for candidates whom the blacks have endorsed, and whites vote for whites.

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[21] Q. Mr. Aycock, based on your experiences and observations of the black community, what effect, if any, would you say Reverend Hill's defeat had on the black community's efforts to achieve representation? A. I would say that it really discouraged it. The black community just felt that, well, what's the use, and they didn't bother. So there was a feeling of complete and almost total discourage-

ment as far as seeking public office was concerned after that.

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Q. Okay. Mr. Aycock, could you tell us whether or not there is a list that is maintained by blacks at election time? A. Yes, there are such lists maintained.

Q. Could you describe these lists for us? A. Well, the lists are relatively simple. They simply name the candidates that blacks feel will be the fairest of the people that are running for a given office. And blacks are asked to vote for them -- those that are endorsed, and not to vote for those that are not endorsed.

[22] Q. What would you say the purpose of a list is? A. Well, the purpose is very clear -- to get people in office who are fair minded in the opinion of black people and keep those out of office who are not fair minded.

Q. What is usually done with this particular list? A. This list is circulated among blacks, taken to their homes, put on their door steps and their porches, and taken to meetings and talked about, so the people will be prepared and know for whom the blacks feel should be voted for at the time of the election.

Q. Are these candidates whose names are on these lists usually persons whom the blacks feel will represent them adequately? A. That's a difficult answer there. I suppose I

should say that they are the best people that the blacks can select out of the available people. And the available people may not include some that they would rather see on there. But since they are not running, sometimes it's perhaps the lesser of the evils in some cases and perhaps not the candidates that the blacks would chose, if they had an opportunity.

Q. Do you feel the blacks have been well represented by these various persons who have been placed on these lists? A. I don't feel that blacks have been represented as well as they perhaps would have been, if they had a chance of a larger selection, a larger choice, a wider range.

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[24] Q. Based on your experiences in the black community, Mr. Aycock, could you tell us why you think there has not been a single black candidate since Reverend Hill ran for office in 1970? A. Well, when Reverend Hill ran and failed to get elected, [25] even though he apparently was elected in the election in people's minds with that plurality vote, it just seemed to cast a sort of a shadow over people.

Q. By "people" what do you mean? A. Well, I had better say black people. And the blacks just didn't feel that there was any chance of being elected, and just nobody has come out to run. In fact, there haven't been any elections, I don't believe, anyway since 1974.

Q. During this period have you been encouraged to run for office? A. Yes, I have been encouraged all along to run for office, particularly since I -- well, I guess because I have been in the education system so long. So I had more encouragement to run for the board of education that for anything else.

Q. Has that been since 1972 -- 1970 also? A. Let me see. Well, yes, but not since the election process has been -- yes, even since 1970.

Q. Would you say that Reverend Hill's defeat had anything to do at all with your feelings about running for office? A. Naturally, it had some effect on me.

Q. Why is that? A. Because I would feel like others that it would just be a useless process to go into it. That would be one of the reasons that I wouldn't want to run.

Q. Based on what? [26] A. Just based on past experience, past performance.

Q. Of whom? A. Well, most recently in Hill's case. Because even with the blacks -- if they all voted one hundred per cent for the black candidate, unless you were able to get a large number of whites to vote, there is just no way to get elected with the system.

Q. Is there any way that you could get a large number of whites to vote for blacks? A. I don't know. From past experience, large numbers don't vote for blacks.

Q. Why is that? A. I don't know. I guess it is a pattern that has just been established. Blacks vote for blacks, and whites vote for whites. Blacks vote for blacks when there is a black to vote for.

Q. You stated that there is one black who has been appointed to the school board -- A. (Interposing) Right.

Q. -- Mr. Carmichael. Would you say he would face any problems, if he ran for office tomorrow? A. If he ran tomorrow under this present system, I think he would face the same problems any other black would face.

Q. What would those be? A. It would be the same system of this majority, at-large type voting. He wouldn't have a chance, if all the blacks in Rome voted for him, unless a lot of the whites voted for him.

[27] Q. Do you think a large number of whites would vote for him? A. I doubt it. I don't know, but I doubt it. They would have to reverse their previous performance.

By Mr. Hancock:

[28] Q. Let's just assume at-large elections were used. Would it help the blacks -- the black community to achieve representation, first of all, if there were no majority vote requirement? Would that be better than using the majority vote requirement? A. That would be better, yes. That would be an improvement.

Q. And it would also be better if the areas had not been annexed to the City? A. Yes.

Q. How about if there were no annexations and if plurality --

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Cross-Examination

By Mr. Brinson:

[52] Q. Doctor Aycock, you have indicated in your testimony that -- well, let me ask you some questions. Do you think that all blacks that voted in the 1970 election voted for Reverend Hill? A. I would think that the vast majority of the blacks that voted in that election voted for Reverend Hill.

Q. Why? [53] A. For the simple reason that Reverend Hill was black for one thing, and they felt that he was qualified. And he was the most likely -- he was the only black running.

Q. I understand that. But do you think that blacks just vote for blacks, or would they vote for the qualified man whether he would be black or white? A. I think they would vote for the qualified man, if they have the proper choice, if the choice isn't limited to where they just have to vote for the lesser of two evils. I think they would vote for the person they think is best qualified.

Q. All right. If you have a black running and a white running, and if you considered the white more qualified than the black, and he would be a better leader for you, would you vote for the white or the black? A. Well, that's a difficult question to answer. I would

possibly vote for the white in that case. That's not the question in my mind. It's the representation that the blacks are concerned about. And with no representation -- and that's about what it amounts to now -- it becomes just a question of academic discussion.

Q. Do you think whites are incapable of representing blacks? A. I wouldn't say that they are totally incapable. They just don't have the ability to speak the language of the blacks. The black community without any black representation is just not represented at its best. I am not saying that there are [54] not sympathetic whites and fair minded whites. I am not saying that.

Q. Well, would you advocate that the commission be mixed black and white? A. I certainly would advocate that it be mixed with black and white -- that all minorities be represented.

Q. All right. Let me ask you this, Doctor Aycock: When you say that you don't have any representation, do you feel that now that you don't have any representation simply because there is not a black on the city commission? A. In a way, as far as numbers are concerned, we don't. We don't have any representation. We are not saying that the whites are not doing something that is on there and trying to represent all of the constituents. But we have no representation at all, and there is no point in saying that we are in the know of things in the beginning or their inception or anything of this sort. There is nobody there.

Q. Would you say that it is more accurate -- which would you say is the more accurate statement -- that you have no representation on the commission or that there are no blacks on the commission? A. Well, we better not just try to confine that to one or the other. You are saying that we should say which is more accurate, saying we have no blacks or that we have no representation. No, it is somewhere in between would come nearer [55] to stating the truth. We don't have the type of representation or as much representation as blacks need and shall I say as whites need. It is not just a black problem. Everybody fares better, when the whole populous is represented.

[56] Q. In your opinion what would a black representative on the city commission do that the present representatives or members of the city commission are not doing? What would he do for the black community? A. Well, in the first place, he would be there to speak for [57] the black community. The black community would feel closer allies with him, I think, where they would go to him. There are many things done outside of these meetings where you see people independently and in person and talk to them about things. You are going to have to wait until the city commission meets, and then you have a little delegation sitting there to be heard to talk about this or to talk about that. I think it would be just a different sort of rapport between this person and the black community.

Q. Do you think that the present city commission or the city commission in the last eight or nine years has responded to the black community or ignored them, or how would

you describe their representation? A. I wouldn't say they have ignored the black community. I don't think they responded as well as they might have. I am not saying they didn't respond at all. I am not saying they ignored them at all. I think they would have responded in a much better way, if they had had a person there in that group that were black.

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[59] Q. Do you think that whites just vote for whites in a case like this? A. By and large, I think they do.

Q. Why do you think that? A. I guess it's a pattern that has been developed over the years. I can't explain that too much. But that idea is just something that is from actual practice. Blacks vote for blacks where there is a black to vote for. And in lieu of that, they vote for the one they think would be fair.

[60] Q. You indicated that Reverend Hill made a pretty good showing. A. He made an excellent showing.

Q. Do you think that all the votes he got were blacks? [61] A. No, I don't. I just indicate that I thought the majority of them were blacks. If I didn't indicate it, I implied it.

Q. Well, have you ever determined whether or not he got quite a number of white votes? A. No, I don't think he did. If he had gotten quite a number of white votes, there

is a possibility he would have won the run-off, so undoubtedly he did not get quite a number, if you mean by quite a number, a large number.

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Q. Now you have indicated that the turn-out of black voters [62] at that election was very good. A. Yes.

Q. How do you know that? A. There is a strong indication of that. For him to have that plurality even though there were serveral whites running against him -- that's the first time to my knowledge that any black person had gotten a plurality out of the other few that I named that had run for office, plus the fact that many blacks had registered and gotten qualified to vote probably of the interest in Hill.

Q. How do you know that? A. Well, Hill was chairman of this coordinating committee, and that put him very close to people, young and old. And there were a lot of people became active that hadn't been active before.

Q. How do you know the numbers, though, of black voters? How do you know that the turn-out was good or excellent, as you described it? A. I described it as excellent for the simple reason that out of those -- I don't remember exactly how many candidates were running -- that he had more than any other candidate. There is no reason to believe that a large number of those people were white. They weren't -- the whites were not going to vote for a man like Hill at that particular time.

He was chairman of the black coordinating committee.

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RE-DIRECT EXAMINATION

By Ms. Jones:

[75] Q. Mr. Aycock, you were asked whether or not the black community has been well represented by the present city commission, which is all white. In your opinion, are there [76] blacks in the black community who could better represent the interests of the blacks in Rome, if they were elected to the city commission? A. Yes, I think so.

Q. Why? A. Well, for the simple reason, among other reasons, just because they are black, and they have better pull with the black population. I am not saying that whites wouldn't do what they could, but no white man can realize the problems of a black man through and through, just like maybe the black man can't communicate the problems of the white man. And that's one of the reasons we are saying the thing needs to be mixed.

Q. If the black community had two candidates, one black and one white, equally qualified, who would you think would best represent the black community? A. If they were equally qualified, I would say the black person would best represent the black community.

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Deposition of H. F. Hunter, Jr.

Direct Examination

By Mr. Brinson:

[3] Q. What public office have you held, either as appointed or elected? A. Well, I served two or three years on the Rome-Floyd Planning Commission. I was appointed by the prior City Commission. I guess that -- I was appointed in the mid-sixties. I belive that's the only governmental body I've served on. Well, I did serve on the Citizens Advisory Committee during that same time, and then I was elected to the City Commission for a six-year term in 1968, and in 1974 was re-elected to a four-year term, and then was -- that same year or early in '75 I suppose it would be, I was [4] elected Chairman of the Commission by my fellow commissioners and still hold that office.

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[10] Q. As of that time, had there been any changes in the City Charter with respect to the objections that you had earlier? A. Yes. This was the first election under the new ward system where the wards were split up by the rivers, and there were [11] three posts, -- there were three wards and three posts in each ward, and the population at that time was -- I'm told was practically identical -- identical, within one or two percent for each ward, and, of course, they had the natural boundaries of the -- of the rivers and this was

the -- I think they set -- we had an election in the three, to achieve the staggered terms which were required by the new election code, there were three that ran for two-year posts, three for four-year posts, and three for six-year posts, and I was one of the six-year posts, and the election code provides for all subsequent elections to be for four-year posts, so basically what happened in two years after -- which would be I guess 1970, the two-year posts were up for election, and then two years after that, the four-year posts, and two years after that the six-year posts were -- which would be three of the six-years plus the three original two-year posts which were re-elected for four years, so it -- it goes that every two years, you have an election. You have two -- three that are up for election for one two-year period and six the following two years, and they are all for four-year posts.

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Cross-Examination

By Ms. Jones:

[65] Q. Uh-huh. Okay. Now, with respect to the annexations that have been made to the city, Mr. Brinson read you a list of annexations which are the subject of this law suite. You stated [66] that at the time the Rockmart and Castle Cover, Saddle Mountain --

MR. BRINSON: Excuse me, Carmen, I read him -- just to make the record exact -- I read him the five annexations of the 13. I didn't read all of the 13; I read him the five that took place when he -- since he's been in office.

Q. Okay. Thank you. You stated that those areas were -- at the -- at the time of annexation they had no residents? A. That's right. That's right.

Q. Okay. Yet they were annexed for the purpose of receiving city services? A. Uh-huh. Prior to development by the owners.

Q. Prior -- okay, so when they was -- when they were annexed, they were being annexed with a view towards developing? A. That's right.

Q. And that with a -- also with a view that they would eventually be inhabited. A. That's right.

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Deposition of Donald Jackson

Direct Examination

By Ms. Jones:

[2] WHEREUPON, DONALD JACKSON, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION:

By Ms. Jones:

Q. State your full name, please. A. Donald Jackson.

Q. Do you have a middle name? A. No middle initial.

Q. What is your address? A. 512 Branham Avenue, Rome, Georgia.

Q. What is the date of your birth? A. August 25th, 1900.

Q. Where were you born? A. Rome, Georgia.

Q. What is your race, Mr. Jackson? [3] A. Negro.

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[7] Q. Are there any other organizations in the City of Rome of which you are a member? A. No, other than just the voter education committee. That's the only thing.

Q. And what is that? A. Well, it is an organization that was organized for the purpose of people registered and once they are registered, [8] getting them to vote.

Q. What people? A. Black people.

Q. Where? In Rome? A. In Rome, yeah.

Q. Do you recall when that was established? A. Do I recall what now?

Q. Do you know when that particular project was established? A. Back around -- it was back in the '60s, but I don't remember the exact time.

Q. And what was the purpose of that project? A. To get blacks registered and once they are registered, get them out to vote.

Q. Why was that type of project necessary? A. Well, it was necessary because at that particular time there were very few blacks registered in Rome.

Q. Why? A. Apathy is the only thing I could say about that.

Q. Apathy -- A. (Interposing) Among blacks. Among blacks, yeah.

Q. Why was there apathy among blacks? A. Well, the only reason I can think of there was because they figured -- I don't know. It has always been said that black votes weren't counted. And so for that reason, blacks have never been too hot about registering.

[9] Q. Who was it that said that black votes aren't counted? A. Blacks were the ones who were saying it. They didn't know, but that was what they said.

Q. Well, since you have been a member of the voter education project, how would you evaluate the success of the program? A. Well, for a while it was good.

Q. When? A. That was back in the '60s. The registration of blacks come up, way up.

Q. Was there any reason for that? A. Well, the only reason that I can see is because of a lot of pressure put on them by the members of the committee to go register.

Q. How would you evaluate the success since them? A. Well, it has gradually gone down since then.

Q. Why? A. Because they didn't vote and were taken off the lists -- off the register.

Q. The blacks who were registered didn't vote, so they were taken off? A. That's right.

Q. When was that? A. Ever since about -- oh, I would say -- they have been doing it all the time, but it was noticeable -- real noticeable in about the '70s, the early '70s.

[10] Q. What time period would you say the program was the most successful in Rome? A. At what time?

Q. Yes. A. In the late '60s and very, very early '70s.

Q. When did you first register to vote, Mr. Jackson? A. It was about 1960, I think it was.

Q. And you registered here in Rome? A. Yes.

Q. Did you have any problems? A. No problems.

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Q. Has there ever been a time when you were asked to speak on behalf of the blacks in the community of Rome? A. Yeah, I have on a number of occasions.

Q. In the black community? A. Yes.

Q. By whom? A. By the community -- people in the community.

Q. On what occasions or what types of matters? A. Registration drives, something concerning the voting and registering.

Q. Since you have been in Rome and during the period you have been a member of the voter education project, have you had an opportunity to observe the level of political participation of blacks in Rome? [11] A. Well, there is not very much participation of blacks as far as politics is concerned. I mean they don't pay too much attention to it, no.

Q. Why not? A. That's another case of apathy. They feel that the candidate that probably would be elected wouldn't make any difference as far as they were concerned.

Q. Why not? A. Well, there is nothing that they would probably do for them; at least that is the way they feel.

Q. What candidates are you speaking of? A. I am speaking about all of them -- the county commissioners, the city commissioners, and all of those people.

Q. In other words, are you saying that there have been problems with blacks receiving representation? A. Well, the people really don't represent the blacks. In other words, I mean you can ask most of the officials here in Rome about the black community, and they don't know anything about it.

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Q. Are you familiar with the election procedures that are used to elect city commissioners and members of the school board? A. Yes.

Q. What are those procedures as you understand them to be? A. You mean how do they go about electing them?

Q. Yes. [12] A. Well, you are required -- I think now they have just the residency, and they have to run from a certain district, but they are elected at-large and a majority. They changed it from a plurality to a majority.

Q. And what is a plurality as opposed to a majority? A. Well, the plurality is that the highest man wins; where a majority, you are going to have to have at least fifty per cent of all the votes that are cast.

Q. Has there been any problems with that particular election procedure that is presently being used in Rome? A. Well, the only problem is that it discourages blacks from trying to get elected.

Q. Okay. Which procedure are you speaking of now, the majority or the plurality? A. The majority. The majority, yeah.

Q. How does that -- A. (Interposing) At-large. See, they realize that it is impossible to get elected where you are going to run at-large and have to have a majority.

Q. Why is that? A. You can't get enough votes.

Q. Who can't? A. No black can.

Q. Why not? A. One of the reasons is you don't have enough blacks [13] registered to make any difference on there.

Q. What if you had enough blacks registered? A. Well, if you had enough blacks registered, you could, yeah.

Q. You could what? A. You could get elected here.

Q. How? A. Well, see, if you had enough blacks, you could get a majority. If there was enough of blacks running -- I mean voting, and the white candidates -- no, you couldn't do it like that, because you would have to get more votes than all the rest of the candidates, and you couldn't do that, no.

Q. Are you still speaking about the majority? A. Yeah, I am speaking about the majority, uh-huh.

Q. What is it about the majority system that makes it impossible to be elected? A. Because you can't get enough votes.

Q. From whom? A. Well, you have to depend mostly on black votes. Now if you are running for city commission, county commission, or one of those jobs, it's a known fact that you are not going to get too many white votes.

Q. Why is that? A. Because they are not going to vote for you.

Q. Has there ever been a time when that has been demonstrated? [14] A. It was demonstrated in the case of Hill.

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Q. Who is Hill? A. Reverend Hill. He is a fellow that ran for the board of education.

Q. Is he black? A. Yes, he is black.

Q. When did he run? A. I don't know what year it was when he was running -- maybe about '70. It was somewhere in the '70s.

Q. Could you tell us about his particular campaign? Why was he not able to get elected? A. Well, he did get into the run-off. But after he got into the run-off, well, then he couldn't win. He couldn't get near enough votes to win.

Q. How did he get into the run-off? A. I don't remember now how many candidates were running. Anyway, he was one of the two highest, and so that put him into the run-off.

Q. Do you recall who the highest was? A. It was some lady.

Q. No. I mean -- A. (Interposing) No. He was the highest. He was the highest, the way I understand it.

Q. In the election? A. Yeah, in that particular election. But not when it come [15] down to a run-off. He couldn't get enough votes to get elected.

Q. So he was defeated in the run-off? A. Yeah, he was defeated, yeah.

Q. Even though he got the most votes in the election? A. Yeah, I understand that, yeah. I don't remember the number of votes he did get, but I understand he was the highest in the election.

Q. What do you think caused him to be defeated? A. Because -- I don't know. For some reason the school board and the commission -- nobody -- you can't expect -- as I said before, you don't have enough blacks, and you can't get sufficient whites to vote for the average Negro. Now Hill was well known. He was well known.

Q. How well known was he? A. About as well known as any black in Rome. He was better known than most blacks.

Q. Why is that? A. Because he was the president of the black coordinating committee.

Q. And what was that? A. That was the committee that was formed to get jobs and a few other things for the benefit of the black community.

Q. What were some of the activities of the black coordinating committee? What kind of things took place with respect to that commit-

tee? [16] A. They went around to different firms and factories and all like that and applied for jobs to get employment for blacks.

Q. What else do they do? A. Well, they held meetings and tried to educate blacks to the benefit of registering and voting.

Q. Do you know why the coordinating committee was even established? A. Well, it was established for the simple reason that at that particular time blacks at that time weren't doing anything at all to help themselves.

Q. So how did this get them to help themselves? A. Through Hill.

Q. Would you say Hill as a candidate was pretty well known? A. He was well known, yes.

Q. How well known was he in the black community? A. Well, he was well known in Rome, all over Rome.

Q. Would that include the whites, too? A. Whites, too, uh-huh.

Q. What kind of things did he do in his campaign, if he didn't get elected? Did he campaign at all? A. Yes, he campaigned. He did all of the things that persons that are running for office usually do.

Q. Like what? A. He would go from place to place and talk and go with other candidates when they have meetings for candidates.

[17] Q. Was that in any particular area? Did he confine himself to the black community or the white community, or did he just go everywhere and try to campaign? A. Well, he went to most places. Now whether he went everywhere or not, I really don't know.

Q. How active was he in campaigning in the black community? A. Well, he was real active.

Q. How about the white community? A. Now if he went into the white community, the only time that I knew of him going was when other candidates would be invited to these places, and he would go with them.

Q. Was he also invited? A. Yes.

[18] Q. Was there any increased interest in getting blacks registered because of the fact that a black candidate was running? A. Yes.

Q. To what extent would you say that interest was increased? A. Well, in different churches and social organizations there was more effort made to get blacks to go and register.

Q. What about the black turn-out? Do you know what the turn-out was for Hill's election? A. Well, the turn-out was very good. It has never been overly good, but it was very good.

Q. How would you try to compare it with past turn-outs? A. Well, it was more than usual.

Q. Why was that? A. Well, on account of they had a black candidate.

Q. Have you had occasion to watch the turn-out since Hill's election -- I mean Hill's campaign? A. Yes.

Q. How does that compare? A. Well, it has fallen off.

Q. Do you have any thoughts as to why? A. Because -- well, now the main reason is that most people, like I said a few minutes ago, they feel that the candidate is [19] not too concerned with the blacks.

Q. What candidate? A. County commissioners, city commissioners, and this board of education, too.

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Q. What problems, if any, have blacks had in getting persons of their choice elected? A. Well, you can't hardly get a person of your choice elected, because you don't have sufficient votes.

Q. Why not? A. Because the people are not registered.

Q. You said they don't have sufficient votes. What do you mean by that? A. Well, I mean the blacks don't care how well they like [20] a man, white or black. If they don't have sufficient numbers registered, they don't have a chance to get him elected.

Q. If you had every black registered, and every black voted, would they still have a chance of electing a person of their choice? A. I don't think so.

Q. Why not? A. Well, I believe that gets right back to this majority.

Q. Why? How does that figure in? A. Well, because the man probably couldn't get enough votes even with all the blacks voting for him to have a majority.

Q. Why not? A. He wouldn't have them. There are just not that many blacks that are registered.

Q. What would he need to get elected? A. In a majority he needs fifty per cent.

Q. And if he doesn't have enough black votes to get elected, what does he need? A. Well, see, you have to have black and white. There is no -- see, now blacks cannot elect a black person or a white person.

Q. Why? A. Right back where we started. We do not have enough blacks that are registered to make that much difference.

Q. What if you had all of the blacks registered? Would you [21] still have a chance? A. If you had all of the blacks registered, and it was still at-large and majority, no.

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Q. How many black votes -- how much support do you think Hill got from the black community? A. Well, he had plenty

support. He got -- well, I would say maybe about ninety per cent, at least, of the black votes.

Q. Do you think that was what gave him a plurality? [22] A. Well, it would have in the election, yes, but not in the run-off.

Q. Why not? A. It wouldn't have been enough.

Q. Why not? What did he need in the run-off? A. In the run-off he would need to have the highest votes.

Q. When Reverend Hill was in this run-off, would he need more than the black support to get elected? A. Yeah.

Q. What else would he need? A. He needs white support.

Q. Do you think he got the white support? A. Some, but not much.

Q. Why not? A. I don't know why they didn't vote for him. I don't know whether it was because he was black or what was the particular reason. But we have to assume that they didn't vote for him, because he was black.

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[23] Q. In your work in the black community over the years and [24] of your experiences with the voter project, what effect would you say that the present election procedures have on blacks' ability to elect someone of their choice? In other words, what effect

would you say the at-large and majority vote requirement have on blacks choosing someone that they want and getting that person elected? A. I think that the blacks can be -- in fact, I know the blacks can be a lot of help to a candidate of their choice. I know that. Now we are getting back now to this: There are very, very, very few blacks that run for office or have been running for office.

Q. Why is that? A. Well, just as I said before, on account of at-large and majority.

Q. What is it about those that makes them not want to run? A. They can't get elected, and they know they can't.

Q. Why do you say they can't get elected? A. They can't get sufficient votes when you are running at-large, and you can't get sufficient votes if there is a majority. But now as far as -- getting back to these candidates of your choice, there have been any number of white candidates who were blacks' choice that did get elected.

Q. What happened? A. Nothing. They just got elected.

Q. Have they adequately represented the blacks in the [25] community? A. I don't think so, because most of the time --now maybe they don't go about it right or something. But I come in contact with a whole lot of people. And there are a lot of things that I think that probably should go before the city commission or that people -- blacks should do -- you know, I mean go -- but they don't. Now they go to Mr. Hamler.

Q. Have you ever been encouraged to run for office? A. Yes, I have.

Q. Has it been often or once or twice? A. Well, any number of times a few years ago, yes.

Q. Why didn't you run? A. I didn't have a chance of winning. I didn't think -- at least I didn't think so.

Q. Are you well known in the city? A. I think so.

Q. Why don't you think you could get elected? A. I could not get a majority, to start with. I know that.

Q. Why not? A. I couldn't get enough people to vote for me.

Q. Why do you feel that, if everybody knows you? A. Well, see, even though I know a lot of white people, and a lot of white people know me, and some of them would vote for me. But it wouldn't be enough of them, with the few blacks that are registered, for me to get a majority.

[26] Q. What if all the blacks were registered, and all the blacks voted, would you still get elected with a majority? A. No.

Q. Why not? A. There are not enough blacks registered. Even if they would all go and vote, you still wouldn't have enough.

Q. So you would need white support? A. You would have to have a lot of white support.

Q. And you don't think you would get enough? A. No.

[27] Q. If those annexations were to remain, could the dilution that they caused be remedied at all? A. Could it be remedied?

Q. Yes. A. I don't know of any way to remedy it, because you can't put them back out of the city.

[28] Q. What I am saying is if you brought in the white population -- increased the white opulation -- and you have the blacks -- and you stated that the effect of those annexations would be diluting the blacks that are already here. A. Yes. That's right.

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Q. What do you think could be done to equalize the situation sort of? A. Well, I think what they might could do, if they would go back to wards, then it would depend then on how the lines were drawn.

Q. What else do you think could be done with respect to election procedures? A. Well, you would have to drop this at-large. You would have to let the person be elected from the ward that he was running from.

Q. What if you kept at-large? What could you do? A. At-large -- no, you would have to cut out at-large.

Q. What about plurality or majority vote? A. Well, plurality is all right, but majority -- as long as you have majority, there is not much chance.

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[30] Q. Mr. Jackson, do you know about a list that is maintained by blacks at election time? A. Yes.

Q. Could you tell us about those particular lists? A. Well, the lists are made up -- now there have been -- in the last two elections there were three lists. Now the lists were made up by the voter education committee. We have the candidates to come out to these different churches and places like that. And then the people decide what candidates that they think are better for the blacks, what candidates are more concerned with the blacks, the problems and so forth.

Q. What do they do then? [31] A. Then we make up this list and endorse certain candidates.

Q. What do you do with the lists after you put them -- A. (Interposing) It is passed out in the city -- passed out in the city.

Q. Is there more than one list, or do blacks stick together and -- A. (Interposing) Well, there were three lists in the last election. I don't know what organizations were passing them out, but I do know there were three lists passed out.

Q. Who compiled the lists? A. James Wright, Joe Wright --

Q. (Interposing) Is this one list? A. -- and a person named Burge.

Q. Was that for one list? A. It was a different list from the voter education committee list.

Q. That's the list that you would be familiar with -- that was your project? A. Yeah. But this other one was -- I don't know if they had a name. But anyway, they did have candidates -- endorsed candidates. And the three people that were endorsing them --names that were on this list was James Wright, Joe Wright, and Burge.

Q. What about the third? A. The third list -- I don't know whose -- remember now whose [32] name was on it.

Q. Was it an individual? A. It was some three individuals, yes.

Q. But yours was an organization? A. Yes.

Q. Are these candidates on these lists that the blacks put out, are they usually candidates who blacks feel will represent them in the best way? A. Yes, that's what they think, yeah.

Q. Do the candidates on the lists that the blacks endorse -- are they often elected? A. A whole lot of times they are, yes.

Q. Once they are elected, do the blacks feel that they are being represented adequately by these candidates? A. No, they don't.

Q. Why? A. Well, because, as I told you a while ago, a lots of times I have people to come to me, but they don't never talk about the commissioner, because the commissioners have said -- I mean it was in the paper. I cut it out, but I couldn't find it today where someone from the justice department was talking to them. And they had no idea about the black community, about what was happening in it or anything else. Now people -- all the time when they want something -- not all the time maybe, but nine times out of ten when they want something, they go directly to [33] Mr. Hamler.

Q. As opposed to what? A. As opposed to going to the commissioners.

Q. Is Mr. Hamler elected? A. No, he is not elected.

Q. So in other words, the people who were thought to be representative of the blacks are not the people who the blacks go to? A. No, they don't go to them, uh-uh.

Q. Okay. With respect to these lists, are there persons who might probably better represent the black community than the ones who are endorsed? A. Well, you can't never tell about how a person is going to act, after he is elected. But in our opinion, the people that we endorse are the people that we think that's going to be better as far as we are concerned.

Q. Has there ever been a time that the black community has endorsed a particular candidate, actually represented the black community? A. I really don't remember any, to tell you the truth. I mean I don't --

(COLLOQUY BETWEEN THE TWO DEFENSE ATTORNEYS.)

I would like to say this: Of all the candidates that I have known down through the years, I would say that Commissioner [34] David Harvey probably has did more than anyone else that I know of.

Q. Okay, Mr. Jackson. Do you think that there are people who were not candidates and who were not on those lists who would better represent the black community? A. No, not in our opinion there wasn't. We pick what we think is the best person as far as we are concerned.

MR. HANCOCK: Let me interrupt just a second. We are talking about everyone, not just the candidates. Are there people in the black community who you feel would better represent you than the candidates?

A. Are you speaking about black people or just people?

MR. HANCOCK: People in general.

A. Well, there probably is, but they are not candidates.

MR. HANCOCK: What you are saying then is that your list is just of the available candidates?

A. Of the people who happen to be running at that particular time, yes.

MR. HANCOCK: You are not saying that those are --

MR. BRINSON: (Interposing) I am going to object to your testifying, Paul. My objection is that it is a leading question, and it will be thrown out. And I -- that's why I am objecting now, so you can ask it properly. And it's also improper for two of you to ask questions. But I mean I want the record to show that there are two people representing the Justice Department [35] here. There is one representing the city. There is one questioning for the city, and there are two questioning for the Justice Department. Now that is not proper under my understanding of the Federal Rules of Civil Procedure and the discovery process. But I can be lenient about it. I just don't want to be lenient about and the leading, too.

MR. HANCOCK: Are you finished with your (inaudible)? Did you understand what distinction we are making between just candidates and other people who might be candidates?

A. Well, there is always someone that is better. I mean that happens in all races. There are better people that are not running than some of the people that are running. But the people that are better and not running -- there is nothing you can do about it.

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Q. With respect to the school board and the city commission, which are elected offices -- A. (Interposing) Uhhuh.

Q. How did it come about that Mr. Carmichael was appointed [36] do you know? A. That he was elected -- I mean appointed?

Q. Right. A. I don't know, no. I don't know.

Q. Was the black community -- was he filling a vacancy or what. A. Oh, yes, he was filling a vacancy, yes.

Q. When does a vacancy come up; do you recall? A. I don't remember the date on that, no. It was about two years ago, I guess. I don't know how the vacancy come up. I don't know whether someone resigned or what happened, but I do know they had a vacancy.

Q. Do you recall whether any members of the black community or any black organizations were contacted with respect to giving suggestions for filling the vacancy? A. No one that I know of, no.

Q. What about the city commission? Have there been any vacancies on the city commission that you can recall? A. Yeah, there has been one or two on that, yes.

Q. Were there any communications with members of the black community or members of the black organizations about possible suggestions for that vacancy? A. Not that I know of.

Q. Have you ever been consulted? A. No.

[37] Q. Do you feel that Mr. Carmichael has been a pretty good representative of the black community? A. Not of the black community, no.

Q. Why not? A. Well, Carmichael is a good man, but he is not concerned with blacks, period.

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REDIRECT EXAMINATION

BY Ms. Jones:

[71] Q. Would it be the same if you ran for, say, the city commission or school board? Would you have as easy a time? A. No, no. That would be difficult.

Q. Are those -- A. (Interposing) Any meaningful job, it would be difficult for not only me, but any black, to win.

Q. Why? A. Because of the system that is used -- at-large and majority. Those are the two main obstacles right there.

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DIRECT EXAMINATION

By Ms. Jones:

[2] WHEREUPON, JOE WRIGHT, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION: By Ms. Jones

A. State your full name. A. Joe Wright.

Q. No middle name? A. No middle name.

Q. What is your present address? A. 814 South Broad Street, Rome, Georgia.

Q. What is your date of birth? A. Date of birth is January 17, 1932.

Q. And where were you born? A. I was born in Centre--Cherokee County, Alabama.

Q. Mr. Wright, what is your race? [3] A. Black.

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[5] Q. Okay. During the time you have lived in Rome and the time you were president of the NAACP, have you had the opportunity to observe the political participation of blacks in the community? A. Yes, I have.

Q. What have you observed? A. Participation has been nil, really. Hasn't been

that much participation as far as being elected to public office and that sort of thing.

Q. Is there anything else you observed? A. In what respect are you speaking now?

Q. Well, by "participation" I mean have blacks actively sought office? Have they registered on a regular basis? A. Oh, yes. Registered.

Q. How much do they participate in politics here in Rome? A. Quite a bit, yes.

[6] Q. In what respect? A. Registering and getting people out to vote and that sort of thing -- endorsing candidates.

Q. Have there ever been any problems that blacks have been faced with in electing representatives of their choice to any public office? A. Well, we haven't been able to elect public officials of our choice.

Q. Why is that? A. Because of the present voting system in Rome.

Q. And what is that? A. I feel it is designed to dilute the black vote.

Q. Why do you say that? A. Because it is structured city-wide voting, and this way, blacks cannot get enough votes of the white population to be elected.

Q. Is there anything else about the way the elections are held? A. Well, I think that blacks could get 100 percent of--well, a

candidate of our choice could get 100 percent of black votes and still could not get elected.

Q. How much does a candidate have to get to be elected; do you know? Do you know what the percentage is? [7] A. Fifty-one percent.

Q. Of all of the votes? A. Of all of the votes --right.

Q. Does that pose a problem for blacks? A. Yes, it does.

Q. Why? A. Because it is just not enough black people in the community to give a candidate fifty-one percent of the votes.

Q. What about the whites in the community--do they give a candidate fifty-one percent of the votes? A. If they block voted, they would.

Q. Do they block vote as a general rule? A. I would think so.

Q. In what way do they block vote? A. Vote for their candidate.

Q. Okay. Are we talking about the white voters? A. Right.

Q. Who would their particular candidate be as a general rule? A. Well, the candidate of their choice would not necessarily be the candidate of the black people's choice, but we are caught in the dilemma of voting for the better of the two candidates subsequently.

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Q. Have there been any blacks who have tried to be elected under this system? A. Yes. Reverend Clyde Hill ran for public office. He was [8] a minister of the East Rome--the Greater Mount Calvary Baptist Church at the time that he ran for election.

Q. When did he run for office and what office did he run for? A. He ran for the board of education back in 1970, I believe.

Q. What types of problems did he encounter? A. Well, he--getting enough votes--get enough votes to win. He won the election in the primary, but in the run-off he lost the election. I think this is because of the way the system is set up. He had to have fifty-one percent of the votes to win in the run-off.

Q. Well, how do you--how did he win the election primary, as you put it? A. I think he did a good job campaigning and he got out and met a lot of people and he got support, the black community particularly.

[11] Q. Could you explain for us how he did, then, in the election? A. I think he did a tremendous job as far as his campaign and all is concerned and getting out, as well as you could do.

Q. As well as anyone at that time could do? A. Yes

Q. Black or white? A. Black or white, yes, as far as campaigning is concerned.

Q. Did he win? A. No, he didn't win

Q. Were you surprised when he lost? A. Yes, I was.

Q. Why was that? A. Because of all the effort and work that had been put into his campaign and the popularity that he had gained at that time.

[12] Q. Why did he lose? A. He lost simply because of the way the voting system is structured here.

Q. And what was that? A. If it had been designed where he could have gotten --on a plurality system, I will say that he would have won.

Q. What is that? What kind of system is that? A. The one that gets the most votes.

Q. How many opponents did he have? A. If I remember correctly, he had two opponents.

Q. Were they white? A. Yes.

Q. And he got the most votes out of those -- A. (Interposing) Right.

Q. -- that field of candidates? A. Right.

Q. Do you recall how many votes he got in the run-off? A. No. He didn't do well in the run-off.

Q. Did he do nearly as well as he did in the primary? A. No. He did real well in the primary, and in the run-off he didn't. And I think if he had gotten a larger number of white folks, he would have won.

Q. So you believe he got considerable black support? [13] A. He did, yes.

Q. Did he get any white support at anytime during that election? A. I don't know. If he did, it was very little, I would say.

Q. Do you think he would have lost that election, if he hadn't been required to get fifty-one per cent of the votes? A. No. He would have won the election.

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Q. Okay. Based upon your experience as NAACP president and the experience you have had working with the black community, what effect, if any, do you think the present election system has on the black community's ability to elect someone of their choice? A. Well, it has all the effect on it in an election the way it is. I just don't think it could be done. I think this is why we don't have blacks to run for public office now, because of the expense involved and the knowledge of knowing that they are not going to get enough white support to win.

Q. How do blacks know they won't get white support? A. Well, after the effort that was put forth to elect Reverend Hill. It's just from past experience.

[14] Q. Have you ever thought about running for any office? A. I have thought about it.

Q. Which one? A. Well, I have thought about running for city commissioner.

Q. Why didn't you run? A. Well, I know that it would be almost an impossible task.

Q. Why is that? A. Well, the way the system is designed, simply. That's it.

Q. What are some of the other things that might discourage you from running? A. I don't know of anything, really, that would discourage me from running.

Q. Besides what you just said? A. Besides what I stated.

Q. And what would that be again? A. That would be the way the system is designed.

Q. What about the system would keep you from even trying? A. Well, the city-wide voting would make it impossible--almost impossible for me to be elected to a public office, I feel. If it was changed to where the majority of the votes would win the election, then I think I would have a good chance, if I ran for public office.

Q. Do you mean a plurality? A. Plurality. Excuse me.

[15] Q. What effect did Hill's defeat have on the black community's ability to elect someone of their choice or your feelings about running? A. Simply, like I stated previously, all of the effort and time that he put in, and he did such a tremendous job of campaigning, and he did not win. This would discourage, I think, a black to run again under the present system.

Q. Do you know of any other blacks who might be discouraged the way you stated you are? A. I think -- yes, I do.

Q. Have you encouraged other blacks to run? A. I asked a friend of mine, James Wright, if he would consider running for public office. He said that he would consider it, but he didn't think he could win.

Q. Is he a popular individual in the city? A. Yes, he is.

Q. Among blacks and whites? A. Yes.

Q. What kind of support do you think he could get or would he get, if he ran? A. I think he would get good support out of the black community.

Q. Wouldn't that be enough? [16] A. No, that wouldn't be enough.

Q. Why not? A. Because the population of the blacks would not warrant enough votes to get him elected.

Q. Why not? A. The way the system is designed.

Q. What is the population of the blacks? A. Around twenty-two per cent, twenty-three per cent of the population of the city.

Q. How does that relate to the requirement that the candidate get fifty-one per cent of the votes? A. Well, there simply is just not enough blacks to vote, even if you have got one hundred per cent, to elect him to public office.

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[20] Q. Have the candidates whom the blacks have endorsed -- have they ever been elected? A. Yes.

Q. Have those candidates been responsive, or have they been adequate representatives of the black community? A. No, I wouldn't say they have.

Q. Why did the black community endorse those candidates, if they were not responsive or adequate representatives? A. Well, they were, we felt, the better of the candidates.

Q. Why? A. Because this is all we had to go with.

Q. Why didn't the members of the black community put up their own candidate, if they didn't think those who were running would represent them adequately? A. Well, it goes

back to -- we had a candidate, Reverend Hill, who ran and lost. Of course, we felt that it would just [21] be fruitless to have a candidate and nobody feel that they could win, so subsequently we didn't have one.

Q. Did the blacks feel that Reverend Hill was about the best they could get for a candidate? A. At that particular time, yes.

Q. Are there any blacks presently who would be maybe as popular, but run into the same problems? A. Yes, I think so.

Q. And who would be as qualified. A. Right.

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Q. Did the school board ever contact the NAACP or any black members of the community for suggestions for filling that vacancy? A. Yes. We were told that a vacancy had been created. Of course, we asked the school board to consider a black at that [22] particular time. They asked us to submit the name of a person we felt that would serve or could serve adequately.

Q. The NAACP? A. I am not sure. I was president at that time. I am not sure if they asked us directly or not, but I know that we got -- the NAACP did get together, had a meeting, and submitted a name to the school board.

Q. Was that suggestion acknowledged at anytime? A. No, it wasn't, no.

Q. Was the person that you suggested appointed? A. No.

Q. In other words, you didn't suggest Elgin Carmichael? A. No, we didn't.

Q. Would you feel that the person that was appointed has adequately represented the black community? A. No, I wouldn't.

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Q. Do you think Elgin Carmichael could get elected, if he ran for that same position? A. No, I don't.

Q. Why not? A. Because he wouldn't get enough white support. And I think even though he might get the black support, it still wouldn't be enough to win.

Q. In other words, you think he might be able to get some support from the blacks? [23] A. Yes.

Q. Is he well known throughout the City? A. Yes, he is.

A. Do you think he could get elected if there was no majority vote requirement? A. Yes, I do.

Q. Why? A. Because he would get enough support out of the black community, I think, to win an election, especially if there were two or three candidates opposing him.

Q. Do you think he would get enough support from the white community, if there was

no majority vote requirements? A. No, I don't.

Q. You don't? A. No.

Q. Do you think anyone else in the black community could get enough support from both blacks and whites with the majority vote requirement? A. No, I don't.

Q. Is there any black in Rome who could get elected under the present voting system? A. No, there isn't.

Q. Why do you say that? A. Because there just would not be enough black voters to get one elected.

[24] Q. What if you got all black support, one hundred per cent? A. Still would not be. They could not get the white support which is necessary to win an election in Rome.

Q. Why do you say that? A. Because the way the system is designed, you have got to run city-wide. And with the number of population, white as opposed to black --

Q. (Interposing) Are you saying that whites wouldn't vote for the black candidates? A. No, not significant, not enough to amount to a win for the candidate.

Q. Why? A. Because it's just not done in Rome.

Q. Why not? A. I don't know.

Q. Has it ever been done in Rome? A. No blacks have ever won an election.

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Q. Has there been an appointment to the city commission? A. No, there hasn't.

Q. Have there been any vacancies? A. Yes, there has been a vacancy.

Q. When was the last vacancy that you can recall? A. Not last year, but the year before last -- the last part of the year before last.

Q. Do you know how that vacancy came about? [25] A. No, I don't.

Q. Did the city commission contact the NAACP or any other black individuals? A. The NAACP got information that there was a vacancy. And, of course, we asked the city commission to appoint a black at that time or consider a black for appointment. And to my knowledge, no response was given to that request.

Q. Do you know who was ultimately appointed to the vacancy? A. I am not sure which member was appointed.

Q. Was it a black person? A. No, it wasn't.

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Q. Mr. Wright, has the city commission been representative of the black community as a whole? A. As a whole, no.

Q. Why do you say that? A. Because there are a lot of needs of the black community that haven't been met -- streets paved and this sort of thing.

Q. What type of person do you think would be necessary to give the black community adequate representation? A. I would think a black person, a black candidate, a black member would certainly know and feel the needs of the black community, and this would help.

Q. What if a candidate was not black? Is it possible for a candidate to adequately represent -- A. (Interposing) Sure it is, yeah. Our contention has [26] never been just to get black representation, but representatives that were responsive to the total needs of the community. We want a qualified person, certainly, but we do feel that there are some black qualified people. And if they had a chance to win an election, they could run, and we could have black representation.

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CROSS-EXAMINATION

By Mr. Brinson:

[32] Q. So when you say that you can't elect anybody of your choice, what you really mean is you can't elect the black of your choice? A. No.

Q. Well, what do you mean? A. I mean a person that is responsive to the needs of the black community. We are usually caught in a dilemma of getting [33] the better of the candidates and going with that -- supporting that particular candidate. It doesn't mean that that's our choice, but it's the choice of the two candidates.

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REDIRECT

By Ms. Jones:

[45] Q. Mr. Wright, you were asked whether or not the present city commissioners are responsive to the needs of the black community. Do you think they are as responsive as a representative [46] of the black community would be? A. No.

Q. Why is that? A. They are just not as responsive. I think a black representative would really know the needs of the community.

Q. Does the person who represents the community have to be black, or is it someone who just represents the community as a whole? A. Just someone that represents the community as a whole, preferably a black, because he would naturally know the needs of the blacks better than a white candidate.

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[48] Q. If there are no obstacles in registering blacks, what obstacles are there for the blacks with respect to elections and voting? A. Even though we have a good number of black citizens registered to vote, a candidate that would run needs the support of the white voters in order to win the way it is designed -- the way the voting system is designed now.

Q. Why does that pose an obstacle? A. Because it is just diluted to where the black voting strength is not enough for a black candidate to win an election.

[49] Q. And are black candidates able to get that white support, or candidates of the black community's choice? A. If they get the white support, they would win an election.

Q. Do they get it? A. No, they don't.

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Deposition of James Wright

DIRECT EXAMINATION

By Ms. Jones:

[2] WHEREUPON, JAMES G. WRIGHT, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION: By Ms. Jones

Q. Would you state your full name for the record? A. James G. Wright.

Q. And what is your present address, Mr. Wright? A. Home address, 111 Perkins Street.

Q. Is that in Rome? A. Rome, Georgia.

Q. How old are you? A. Forty-five.

Q. And what is your race? A. Black.

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[6] Q. So blacks are renting? A. So blacks are renting. So I felt that this might be used good, if it were used in the black community to upgrade the streets for curb and gutter.

Q. How was the block grant money used, as far as you know? A. Well, as far as I know now, it is being used now to upgrade some houses in the black community in the South Rome area. And I think that's good.

Q. And you had spoken out on that? A. Right.

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Q. Okay. Based on your experience in the black community during the years you have been in Rome, have you had the opportunity to observe the political participation of blacks -- A. (Interposing) Yes.

Q. -- and their level of activity in the political process here? A. Yes, I have.

[7] Q. How would you describe blacks' activities in politics overall? A. As far as running for office, I would describe it as poor.

Q. What about registration? A. Registration. We have had some registration drives. And at one time I think we did real well, but right now it is down a little bit. But we plan to have another drive sometime this summer.

Q. Could you describe for us the present election system that is used in Rome for electing public officials? A. Well, the way I interpret the present system now, it is based on a ward system. I think we have one, two --we have three wards, and in order to win you must have fifty-one per cent of the votes in order to win.

Q. Now the candidates run from wards? A. The candidates run from wards, but you be voted on city-wide. Right.

Q. Does this particular system pose a problem for blacks in Rome as far as electing people of their choice to office? A. Yes.

Q. Why? A. Because I don't feel that a black can get elected under the present system in order to win with fifty-one per cent, because there are not enough blacks in the community to have that majority.

[8] Q. But aren't there whites in the community? Blacks aren't the only ones in the community. A. I know, but I just don't feel that enough whites will vote to elect a black under the present system.

Q. Why not? A. Well, I don't feel that Rome is ready for it. I just feel like that there is too much prejudice in this town to accept a black under the present system. I feel that way.

Q. Does that apply to all whites? A. No.

Q. Does it apply to a significant number? A. I would say a number, yes.

Q. What do you base that on? A. Well, I base that on -- from the time that Reverend Hill ran -- Clyde Hill. He got the majority of the votes in the election, and then in the run-off he didn't get fifty-one per cent, so he lost.

Q. When you say he got the majority of votes in the election, what do you mean? Do you mean he got the highest number? A. He got the highest number of votes in the election, but he didn't have fifty-one per cent, so that means there had to be a run-off.

Q. What happened in the run-off? A. In the run-off he got less than fifty-one per cent, so he lost. But had it been -- had the law been where you win with [9] a simple majority -- I hope I'm right -- simple majority, then he could have won.

Q. Simple majority -- what is that, as you know it? A. Well, the way I interpret it, the one that has the most votes, he wins.

Q. What is it when you have fifty-one per cent of the votes? What is that called? A. I guess that would be the majority of the votes.

Q. So we are using the same term to mean different things? A. Different things, right.

Q. Okay. Now what is meant -- do you know what it is called actually when the person gets the highest number of votes? There is a term. A. Plurality.

Q. Okay. If there had been a plurality system when Reverend Hill ran, would he have won? A. Yes.

Q. What was in effect at the time? A. The city-wide voting.

Q. And what else? A. Huh?

Q. City-wide voting and what else? How many votes did he have to get? A. Fifty-one per cent. Right. But I would like to say that I think that if we would go to the ward system and vote in the [10] ward system on a plurality vote, I think the black would stand a better chance of being elected. For instance, in South Rome and East Rome and possibly North Rome -- I don't know exactly what percentage we would have, but in South Rome I believe we would come somewhere in the neighborhood of forty something per cent; and

maybe East Rome thirty-eight or thirty-nine per cent; and maybe North Rome thirty-five per cent or something like that. And if we vote in the ward system, I feel like that we would have a better chance of winning.

Q. Why is that? A. Well, if five candidates ran, and you would vote in this particular ward, and it was thirty-five or forty per cent in the black community, I feel like that we would pick up enough votes in order to get the majority.

Q. Would there be whites who might vote for the blacks in those wards? A. Sure. I think some whites would vote for blacks, yes.

Q. Have you ever proposed that such a system be established in Rome? A. Yes. I talked with Buddy Childers, state representative, and we talked about a couple of plans. In fact, he called a public hearing and presented them to us. And he said he would go along with that particular plan, but it wasn't his choice. His choice was, I believe, if I am not mistaken, was to just have a plurality vote city-wide. But we in the black community felt that the ward system would be better for us.

Q. What happened? A. Well, what happened -- well, he had the meeting, and he invited the other state representatives and the senator. And he also invited the city commissioners to come to look at his plan and hear his plan. But he said that the city commissioners refused to come, because they said it was in -- that the case was in court. But he felt that if they come and would listen to his plan and accept his plan, that the court case wouldn't

be necessary. And we agreed. We thought that it would save the city and the taxpayer money.

Q. What about Reverend Hill's campaign? What type of campaign did he have? What caused him to get the highest number of votes in the city? Did he have an active campaign? A. He had a fairly active campaign. He went to different groups and spoke at churches and maybe a few civic organizations. But by so many candidates running, I think that had something to do with it. I don't know exactly how many ran at that particular time, but I think by it being maybe three or four candidates running, I think maybe that helped to get the majority of the votes.

Q. Do you know whether or not he campaigned at all in white areas or whether he solicited white votes? A. Yes, I think he spoke to some civic groups. I am not for sure what the names are, but I am sure he did.

[12] Q. Do you recall the kind of support he got in the black community? A. Yes. He got good support in the black community. We had a lot of respect for Reverend Hill. In fact, when he left, it was real sad, because blacks respected him, and they went to him with their problems. He would be a spokesman for them.

Q. Was he active? A. He was very active.

Q. What were some of his activities? A. He participated in the NAACP, and I think he was on this black coordinating committee we

had, when we had the sit-ins and demonstrations here. He was very active and was very influential in helping the kids to settle down, so we could go and talk about different problems and work them out. So he was very active.

Q. Were you surprised when he lost? A. No.

Q. Why not? A. Because I didn't feel he could win under the present system. Not that I knew that much about it, but I just felt that he couldn't win with the number of whites in the community and with so few blacks.

Q. Were you ever optimistic though? A. That he could win?

Q. (Counsel nods head up and down.) [13] A. Sure, I was optimistic.

Q. When he won the plurality? A. Yeah. We were encouraged, yeah.

Q. But deep down inside you were surprised? You were not surprised when he lost? A. No.

Q. How would you describe his impact on the black community, and how would that impact compare with other blacks at the time or since? A. He was the spokesman in the black community when he was here. There is no doubt about it. He had a great impact among the youth in this community. You could go to him any time of night or day and talk to him, and he would listen to you, and he would go

with you, if there was a problem in the school with the school board and over to East Rome, West Rome High, anywhere. He was the spokesman. There is no doubt about it.

Q. Would he have been a good representative for the entire community? A. Yes.

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Q. What effect did his defeat have, if any, on the black community? A. I think it discouraged the blacks from even seeking election again, because they didn't feel that they could win under the system. It discouraged quite a few.

Q. Why did they feel that? Because he lost? [14] A. Yes. It kind of discouraged me. I had thought about running one time. Under the system I just didn't feel that I could win, so I didn't run.

Q. What if there was no requirement that you get fifty-one per cent of the votes? A. I probably would consider running.

Q. Are there other blacks who you have encouraged to run? A. Yes. We have talked to Mr. Aycock, Sims, Joe Wright, myself. Any number we have talked to.

Q. Why haven't these blacks run for office? A. They don't feel that they can get elected under the present system.

A. They don't feel that they can get elected under the present system.

Q. Is it expensive to run for office? A. I don't think it is that expensive. It might be, but I don't think so.

Q. Would it be time-consuming? A. Maybe time-consuming, yeah.

Q. Are those some of the reaons why they won't run or why you wouldn't run? A. Time-consuming?

Q. (Counsel nods head up and down.) A. No.

Q. What would be the reasons? A. I think the election laws, the way they are set up now, is probably the reason why they won't run.

[15] Q. What if there were no wards? Is there anything else that could be done to make it a little more encouraging for blacks? A. Well, I think the plurality system would be encouraging, but I still lean on the ward system.

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[17] Q. Have there ever been any blacks appointed to public office in Rome? A. One.

Q. Who? A. Elgin Carmichael.

Q. When was that? A. May be three years ago or two years ago, something like that, yeah.

Q. How did his appointment come about? A. Either some -- I think somebody resigned off of the board, and the school board appointed Elgin to the board.

Q. Was there ever any mention of filling the vacancy with a black person? A. Yeah. In fact, we talked with the chairman of the school board and --

Q. (Interposing) Who is "we?" A. Jerry Bryant.

A. Who is "we?" You said "we." [18] A. Joe Wright and myself. And I talked with Jerry personally also about it. And he said --

Q. (Interposing) Was Mr. Wright filling any capacity when he spoke with him, or were you both speaking on your own behalf or what? A. We were speaking on behalf of the NAACP and the black community, yeah, because we were on the educational committee at that time.

Q. What were you speaking about? A. We were asking him to fill the vacancy with a black, and they told us they would, and they asked for a name for a recommendation. We recommended a name to them, but they didn't accept the one that we recommended. They selected Elgin.

Q. Did they ever let you know that they were not going to select that person? A. No.

Q. They just selected who they did? A. Right. In fact, we didn't know who they were going to select until we heard it on the radio or in the newspaper.

Q. Have there been any similar vacancies on the city commission? A. Yes. I know of one in particular. I belive Commissioner Tolbert was killed in an accident, and there was a vacancy there.

Q. Were blacks considered for that vacancy? A. Not to my knowledge, no.

[19] Q. Mr. Carmichael has been on the school board a couple of years? A. Right.

Q. Is he well-known in the city? A. Yes.

Q. If he ran for the same office or the same seat that he presently holds, would he run into the same problems that you stated most blacks would? A. I think so.

Q. Why? A. I just don't feel like the white community would give him that kind of support to elect him.

Q. Even though he has been tried and tested? A. He hasn't been tried and tested. He was appointed.

Q. What if there was no majority vote requirement? Do you think he would have a problem getting elected? A. I think he would have a better chance.

Q. But he couldn't get fifty-one per cent of the city's votes? A. I don't think so.

Q. Is there any black in Rome who you think could do that? A. No.

Q. Is there any black in Rome who you think could qualify or could get a plurality? A. Yes, I think so.

Q. Do you think you could? A. Sure, I have confidence, yeah. I believe I could.

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[21] Q. Would you say that the present school board and city commission respond to the average black citizen in Rome? I'm not speaking of you; I am speaking of the average citizen who is black. A. No.

Q. Why do you say that? A. Well, if you will go into our communities and look at the areas where some of them live, the streets, the housing. You will see housing projects, which I whole-heartedly disagree with. You can tell that they don't get the same kind of attention that the poeple in the white community get.

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Cross-Examination

By Mr. Brinson:

[36] Q. Mr. Wright, you have listed a number of black candidates that you were

aware of that had run in Rome before -- A. (Interposing) Right.

Q. -- over those past several years?

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Re-Direct Examination

By Ms. Jones:

[51] Q. When the black community endorses white candidates, what are they trying to accomplish? Why is that done? A. Well, we are trying to get representation in the black community, trying to -- we feel that the one that will represent us and not be afraid to speak out in our behalf in the black community -- you will find that in the sourthern states, at least particularly in this area, some white candidates are afraid to speak out on behalf of the black community. We talked to them. When we talked to the county commissioners when they were running, we asked them if they would be willing to hire some blacks over in the courthouse and the annex and maybe hire some more at the county -- on the police department or sheriff's department, and they agreed. I don't say they all have lived up to what they have said, but at least they made the promise, when they were confronted, so that's why we --

Q. Often the black community endorses persons who say they are willing to represent the black community. A. Right.

Q. Do they always live up to what they say? A. No.

[52] Q. How many times -- would you say it was more often they don't or usually they do? Could you put a numerical -- nine times out of ten that they live up to it? A. I would say a fifty/fifty chance.

Q. Are there often people in the black community who would better represent the blacks, but who are not running, who choose not to run? A. Yes.

Q. (By Ms. Jones) Mr. Wright, you stated that when blacks [53] endorse white candidates, there would be somebody in the black community who you feel would be a better representative, who might be black but who happens not to be running. A. Yes.

Q. Why do black candidates endorse white candidates? A. Why do black candidates?

Q. I mean why do blacks in the community -- I'm sorry -- A. (Interposing) Uh-huh.

Q. -- endorse these white candidates, if they are not certain that these candidates will live up to being adequate representatives of the black community? A. Well, we don't feel that a black can win under the present system, so we have to go with somebody that we feel will be representative to the black community. And we just don't feel that a black can win under the present system. I know I wouldn't run under the present system.

Q. Would you run if the system changed in any way? A. Most likely, yes.

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Deposition of Curtis Moreland

Direct Examination

By Ms. Jones:

[3] Q. Would you state your age? A. Fifty-three.

Q. What is your race, Mr. Moreland? A. Black. Negroid.

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[5] Q. Have you ever done any research on any matters that involve the black community in Rome? A. Research in what area? In educational or job --

Q. (Interposing) Voting. [6] A. Oh, yes. Well, sometime ago we had a concert effort in soliciting, aiding, coercing blacks to vote, that type of thing, on I know at least two occasions.

Q. Have you had the opportunity to observe the political participation of blacks in Rome over the years -- A. (Interposing) Yes.

Q. -- that you have been here? A. Yes, I have.

Q. How would you describe that activity on the part of the blacks? Do they run for office? Do they register in large numbers? Do they vote? Are they as active as

the white community? A. Through our efforts of trying to get them to register to vote, I think that -- again -- I am almost sure that they vote. We have had in the past through, again, great efforts competent personnel to run for office with no success.

Q. Would you describe the participation generally slight, or are blacks active politically? A. No, inactive.

Q. What about the young community? A. It is hardened. The blacks of this community have no faith in the political process here in the City of Rome.

Q. Why is that? A. They are fighting a losing battle. This is in my conversation with them. And I have quite a bit of conversations [7] with them through youth activities and this type of thing. There is no panacea. There is no guiding light. There is no one that they can point to with a finger of success.

Q. Does the system as you understand it to be as it presently exists pose any problems at all for blacks in electing persons of their choice to public office? A. It's a big problem. First of all, if we look at the composition of the City of Rome, I would dare say that the population of this city is somewhere around twenty-three, [8] twenty-five per cent black. And to win -- you could not win with that amount. You see, whites do not vote black in the City of Rome.

Q. Why not? A. This is historical. I don't know why. We have had --we have got

a number of competent black people, but -- I really can't answer you in terms of why they will not, but whites will not vote blacks. And it has been demonstrated through the years.

Q. Is it because of attitudes, or what do you base your opinion on? A. Oh, I imagine it is a matter of education. I don't know the reason. They will have to give that reason. But it has been demonstrated in the past that it will just not occur. Now again, you have some whites that will. But in order to get that simple majority, there's not enough whites that feel that way.

Q. So in other words, do you feel blacks can ever elect a candidate of their choice under the present system? A. Whenever the attitude changes where whites will vote black -- and I do not foresee that -- yes.

Q. What if there was no majority vote requirement? A. Our possibilities of winning would be a little better, because, you see, wherever there is a number of candidates running for any given office, there is a dilution of votes. If the percentages of those candidates be white, then it dilutes their vote to the extent that the black candidate stands a [9] chance.

Q. You mean they split their votes -- A. (Interposing) They split their votes.

Q. -- among the white candidates? A. Yes.

Q. So in that case a black would not be required to get fifty-one per cent? A. Well, in a primary, no. But in the run-off --

Q. (Interposing) I am saying if there was no majority vote requirement. A. Yes. Where there is no requirement of a simple majority, the possibilities -- this isn't guaranteed. But the possibilities would be better.

Q. Have there ever been any blacks who have run for public office in Rome? A. There has been -- I know of three, one a Democrat, and two Republicans. Can I elaborate here just a moment?

Q. Sure. A. First of all, if he is a Republican and black, he has got two strikes against him, because there are very few black Republicans. And I would dare say there are fewer white Republicans in this area. So if he is going to run on the Republican ticket, he has lost at the outset. The other -- let me give you an example: Some years ago we had a candidate come to run for a member of the board of education and gave a very good showing. His name was Hill. And in fact, he ran a good race and won it, and there was a run-off of two very fine candidates, Doctor Hoyt and Reverend Hill, both fine candidates. Hill, if my memory serves me correctly, gained the majority of votes, but was yet not a simple majority. Then in the run-off --

Q. (Interposing) By majority you mean he got the most -- A. (Interposing) He got the most votes, but not fifty-one per cent of the votes cast. And then there was a run-off. This makes me sure that a black could not win, because in the run-off he was whipped mercifully.

Q. Why is that? What do you think his reasons for defeat were? A. Whites will not vote for blacks. It's as simple as that. They just will not vote for blacks. Now they did vote for him in the -- there were some that voted for him in the initial race. But when it came down to white versus black, then the true picture came to light.

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Q. Would you tell us a bit about Reverend Hill's campaign? Did he campaign in the black areas or white areas? A. He was a very viable candidate, a young man, knowledgeable man, a man that solidified the political picture of blacks in this community, a man that was not considered radical in nature, a man that was considered by whites as a fine young man. He was just the thing at the time. He represented the community, not [11] black or white. He was that type of man that could unify, solve problems of a civic nature, that type of thing. He did do a lot of campaigning, not only in black neighborhoods, but in white. He stirred up the young people to the extent that they went to vote. Not only did they go to vote; they folded letters, and they carried banners, and they did things like this.

[12] Q. Were you surprised when Reverend Hill lost the election? A. Terribly so. His showing in the initial running gave vent to hope, unfulfilled dreams. It was just the thing that we needed, really.

Q. So did his defeat have any effect at all on the black community? A. It killed a political dream of the peopie, really. It re-

turned us back to an age that I just don't like for us to have to recall.

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[13] Q. Is there anything that would encourage blacks to become as politically active as they were, apparently, at that time? A. You are asking for my -- the way I think?

Q. Yes, sir. A. All right. There are two possibilities. First of all, if we do away with the simple majority, that will not guarantee it. In fact, there is nothing that is going to guarantee it. But that would be the simply way, to remove where we will have to have a simple majority and run-offs and things like that.

[17] Q. Have any blacks ever been appointed to public office in Rome? A. Not -- yes, Elgin Carmichael to the board of education.

Q. When was he appointed; do you recall? A. I think Elgin has been on the board now for about three years. I think that is the case.

Q. If he ran for office for the same seat that he has on the school board, would he encounter the same problems that you state most blacks would? A. Elgin would suffer the same consequences. And I think if you would ask him, he would be the first to admit it. He served well on the board of education. He is well-liked by his co-workers on the board of education. He is well-known in this city, a competent young man. But he would suffer the same defeat as any black candidate would.

Q. And what is that? A. He would suffer defeat using the methods that we now employ, and that is the method of a simple majority is the winner -- requiring a simple majority.

Q. Why would he not be able to get a majority A. Whites will not vote blacks. It's as simple as that. Whites will not vote blacks.

Cross-Examination

By Mr. Brinson:

[25] Q. Okay. All right, sir. Now you have made the statement that whites will not vote black. A. This is true.

Q. All right. Now what are the facts upon which you base -- that is your opinion, obviously? A. Yes, sir.

Q. What are the facts on which you base that opinion? [26] A. Because of the way demonstrated in the past. We have never been able to mount a campaign successfully in a black candidate.

[47] A. In an at-large situation as exists in the City of Rome, does a black candidate who has any hope of success need to campaign for white votes. A. He needs to; he has got to; he must have. But he -- once again, it's a losing battle. Whether he campaigns or not, it's a losing battle.

Re-Direct Examination

By Ms. Jones:

[51] Q. You also stated that whites won't vote for blacks, and you based that largely on Reverend Hill's election. A. Uh-huh.

Q. Are there any experiences in your past or in living in Rome on which you also base that? A. That whites will not vote for blacks?

Q. In other words, as a black living in the Rome community, would you have reason to base your opinion on other things, that whites won't vote for blacks? A. I am a little --

Q. (Interposing) Such as when you went to buy your house, and you -- A. (Interposing) Okay. That's not a voting situation, no.

[52] MR. BRINSON: I object to that as leading.

Q. (By Ms. Jones) I am not speaking of voting situations. I am speaking of situations as a resident of Rome. A. In other words --

Q. (Interposing) Just in general. A. All right. Are you speaking in terms of are there those who would discriminate against me because of my color?

Q. Yes. A. Oh, sure, that's true.

Q. We discussed Reverend Hill quite a bit. Would you tell us what impact, if any, he had on the black community and how that impact compared with any other black who had been in Rome in recent years? A. Rome, from my observation, was not a very viable politically conscious area for blacks, and I am speaking from the time I was here. And I imagine that that feeling had to be nurtured with time. It wasn't one that spun overnight. With the coming of Hill -- I don't know what magic he had, whether it was the manner in which he presented himself or whether it was the radiance that glowed from him as an individual, but he was able to bring together not only black folks, but white folks. But the need was more felt in black communities where the apathy existed. He had no reason as a black man to seek, want, and cuddle political structures until Hill told him -- not only told him, but showed him that you can move mountains with a ballot. [53] And he gained a new insight -- the black man did -- a new insight in his place in this town. There were, at the same time, radical fringes that could have pulled them that way, but they didn't. It was through Reverend Hill that -- he even brought these people together.

Q. Okay. You also mentioned some blacks who you deemed qualified, and you suggested they run for office. Would you state for us why they haven't run? A. My opinion?

Q. Uh-huh. A. My opinion is that --

Q. (Interposing) Including yourself. You stated that you have thought of running. A. Yeah, I -- you know, if the

urge hit me hard enough, it would not be for a local office, because my chances are virtually null under the present system.

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Deposition of E. J. Thomas, Jr.

Direct Examination

By Ms. Jones:

[2] WHEREUPON, E. J. THOMAS, JR., after having first been duly sworn, testitied as follows:

Direct Examination

By Ms. Jones:

Q. Would you state your full name for the record, please? A. My name is Edgar James Thomas, Jr.

Q. What is your present address, Mr. Thomas? A. 5 Pine Street, Rome, Georgia.

Q. What is your age? A. Twenty-eight.

Q. What is your race? A. Black.

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[4] Q. Have you ever given any thought about running for a public office in Rome? A. Yes, I gave it thought -- not real serious thought, but I have thought about it.

Q. You, in other words, have had some political inclination? A. Right.

Q. Are you familiar with the present election system in Rome? A. Yes, I am.

Q. For the school board and the commission? A. Yes.

Q. What office have you thought of running for? A. Well, at once I thought about running for commissioner, when I was living out in West Rome. I thought about it.

Q. Not seriously? A. Well, I didn't go through no type of -- you know, I didn't go through anything trying to -- I just thought about it. I thought of my chances, and I sort of dismissed it after a while.

Q. And did you know, at the time that you thought about public office, what would be required of you, if you ran, or the methods that you would run under? A. Yes, I was familiar, yes.

[5] Q. What was it? A. Well, I would have to get at least fifty-one per cent of the votes in order to win. I knew that the post would be voted on city-wide.

Q. And you said you dismissed the thought because of your chances? A. Yes. I didn't really feel that I could get fifty-one per cent of the votes. I just dismissed it.

Q. Did it have anything to do with your inexperience or lack of exposure to the political system that you didn't feel you could

get the votes? A. No, it wasn't that. I felt that due to the majority here in Rome, since blacks only make up about twenty-five per cent, and that I knew I would have to have at least all of that plus at least -- what -- twenty-

six, twenty-seven per cent of the white vote in order to win, well, I didn't think that I could -- I didn't think that I could get that much --that many votes.

Q. If you were not required to get fifty-one per cent of the votes, would that have had any effect on your decision whether or not to run -- your ideas about running? A. Possibly so. Possibly so. If I felt that I had an even chance, then maybe at the time I would have possibly tried to win the -- run.

Q. Of course, you realize that you would have to wage a good campaign and get as much support as possible? [6] A. This is true.

Q. Are there any other blacks in the Rome community, particularly young blacks, who might feel the way you do? A. I'm sure there are quite a few. I am quite sure.

Q. In your experiences in the black community in Rome, have you had a chance to observe the political participation of the young blacks, of which you make up a member? A. Yes, I have. I think there has really been a lack of interest toward our election system here in Rome with the younger blacks, because I guess they feel more or less like I do, that if the candidate that they actually -- if they want a candidate of their choice, then they alone

could not put him in office. So it's really just a lack of interest.

Q. Has that shown or been indicated in the level of participation and registration and actual voting and running?

MR. BRINSON: I object to that as leading.

Q. (By Ms. Jones) You may answer the question. A. I would think so.

Q. In what way? A. Well, as I was saying earlier, no one likes to do anything, unless they feel that they have a chance. And a lot of times if you will spend a lot of energy and effort and time, then you do want to feel that you have a chance, you know. And due to our present system, I think that most blacks feel as I do, that we really don't have an equal chance because of the fifty-one [7] per cent majority.

Q. By "equal" you mean equal to, say, a young white man with your experience and your notoriety? A. Precisely.

Q. Would have an advantage because of the system? A. Well, yes, I think that he would have, simple because the whites do make up about three-quarters of the population here in Rome and would make it much, much, much more easier for him.

MR. BRINSON: Just for the record, I want to object to that last question and response as having been a leading question.

Q. (By Ms. Jones) Has there ever been a time in Rome when the young blacks have been politically active? A. Yes. I recall -- well, the only election that I can recall that there was real good participation among the blacks was when Reverend Hill ran for the board of education.

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[8] Q. Could you tell us a bit about Reverend Hill's campaign? Did he win? Did he make a good showing? A. Yes, he made a good showing. He had to go into a run-off, because he did get the majority of the votes the first time around.

Q. "Majority" meaning what? A. Well, he got the most votes between all the candidates that were running. But when it came down to -- because of the law of the fifty-one per cent majority, it went into a run-off, and it was him against one other candidate, and he lost. He lost bad.

Q. Why do you think he lost? What was the reason for his defeat, if he had won in the initial election and turned around and lost in the run-off? A. Well, I think he lost because people here in Rome do tend to vote toward racial lines. And since it was a white candidate and a black candidate running, I think that the white community came out and voted. And by them being a majority, even though the blacks did come out again in the run-off and voted, it was just not enought. We were too small in number.

Q. Do all whites, do you think, vote on racial lines and all blacks vote on racial lines? A. No, I don't think so.

Q. Why? A. Well, when you say "all," that means everybody. I don't [9] think that everybody would vote for a candidate simply because he is black or white or whatever. But I do think in a majority -- when it comes down to a black candidate and a white candidate, both of them have equal qualifications, then I think that majority, regardless of the qualifications -- I think the majority of the white will vote for the white, and the majority of the blacks are going to vote for the black candidate.

Q. With Reverend Hill, were your surprised when he lost in the run-off? A. No, I wasn't surprised.

Q. Why not? A. Well, just because the people that he was representing or the blacks here in the community, as I said, are such a minority that it just wasn't enough numbers to -- I didn't think that he had a chance, to be honest, in the run-off.

Q. Do you know if he got any white votes in the first election? A. I don't know.

Q. Would he have lost if there had been no requirement to get fifty-one per cent of the votes? A. You mean --

Q. (Interposing) When he ran -- A. (Interposing) In the first --

Q. (Interposing) Yes. A. No, he would have won, according to the first election, [10] when they first ran, than if it wasn't a requirement for fifty-one per cent of the votes. Then he would have won the seat.

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[11] Q. Did his defeat have any effect at all on the black community's ability to elect someone or their political participation in Rome? A. Yes. I am afraid it did. Well, seemingly, after the run-off and after he lost, people once again went back to saying that, you know, there is no way; there is no chance, because the black community did work real hard in that election even though it was -- you know, they worked real hard. And I imagine a lot of people that had never voted before voted in that election.

Q. Does that go for young blacks as well? A. Yes. Yes, young and old and middle-aged.

Q. Did it in any way discourage you? A. Well, I am afraid it did. Well, once again, it just showed that when it come to the numbers and with the present system that we do have, a requirement of fifty-one per cent of the votes, then this would be discouraging to me. It was [12] discouraging to me and to anyone else that is black or a minority in this community, because it is just impossible to go -- you can't beat numbers, you know. You can't beat them.

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Deposition of John Houser

Direct Examination

By Ms. Jones:

[2] WHEREUPON, JOHN W. HOUSER, JR., after having first been duly sworn, testified as follows:

Direct Examination

By Ms. Jones:

Q. Would you state your full name for the record? A. Dr. John W. Houser, Jr.

Q. What is your present address? A. 1006 E. First Street, Rome, Georgia.

Q. How old are you, Doctor Houser? A. Fifty-eight in July.

Q. What is your race? A. Negro.

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[4] Q. Have you ever sought to be elected to a public office? A. Yeah. I ran for the board of education one year and I don't recall what year it was.

Q. Can you approximate how many years ago it was? Was it the sixties--late fifties? A. Probably the early sixties or late fifties.

Q. Did you win? A. No, I lost.

Q. Who were your opponents? A. The incumbent board was the only people running that I knew, there were no other black people running, but me, but as far as I know it was just the original, not the original, but the board members at the present time was running and me.

Cross Examination

By Mr. Brinson:

[10] Q. Did you, Doctor Houser, just run one time? A. Yes.

Q. And that was before 1965? A. I'm sure it was, I don't recall the year, but I'm sure it was before 1965.

Q. What members of the black community encouraged you to run? A. Several civic organizations at that time. There was an organization, it was some group or clubs that were encouraging me plus some of the black leading citizens.

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Direct Examination

By Mr. Brinson:

[20] Q. Do you know whether or not--you remember that Reverend Hill [21] was defeated? A. Yes.

Q. Do you know whether or not that defeat had any particular effect on the black community? A. I don't know, when you are defeated each time, you know it always makes you feel like its an impossibility because, let's see, Whatley ran, I ran, Reverend Hill ran, I guess we are the only three blacks that really ran and each time we were defeated and I don't know how long Carmichael has been on the board of education but he has been appointed to the board of education and it would certainly be that you wouldn't know whether you could win an election or not since we haven't.

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Deposition of Napoleon Fielder

Direct Examination

By Ms. Jones:

[15] Q. So if the black community put up a candidate, and the candidate happened to be black, could they vote that person in office with the fifty-one per cent requirement. A. If he was in a -- if it was a district voting, tyes.

Q. What if it is city-wide? A. No.

Q. Why not? A. Well, as I said, you have got the majority white.

Q. Won't they vote for blacks? A. Some will.

Q. How many? A. I couldn't say that, but I mean the majority would automatically --I mean you are asking me for my opinion.

Q. Right. A. This is the only way I can answer, that from the past this is what happens.

Q. Tell me why you say "in the past." What happened in the past? [16] A. Well, I'm talking about history, you know, on up say the '50s and the '40s and the '60s and the '70s. I mean, you know, sequence and the way things has gone.

Q. What if a black candidate wasn't required to get fifty-one per cent of the votes, but just required to get the highest number of votes? A. If he was running in a district, and if it was populated in the -- yeah, he would stand a better chance.

Q. What if he wasn't running from a district, but was running at-large and was required only to get the highest number of votes? A. Do I think he could win?

Q. Yes. A. Yes.

Q. What if he was required to get fifty-one per cent of the votes? A. For the district?

Q. No. A. City?

Q. Right. A. No.

Q. Why not? A. Well, just what I said, that the majority rules.

[21] Q. If Reverend Hill had not been required to get fifty-one per cent of the votes, what would have happened? A. Well, I think he would have won in the primary.

Q. Even though he ran against Doctor Hoyt? A. Yes. Because, see, the more people that is in a race, the more the votes is split up.

Q. And what happened when they went to the run-off? A. Well, everybody just -- the other four candidates, they -- it seems like their votes went to Doctor Hoyt, and that's where it was -- you know, in the election, and not somebody took them out of the machine and put them over there, that it was they actually voted for her.

Q. Did Reverend Hill's defeat have any effect at all on the black community as far as their aspirations for electing a representative to the school board is concerned? A. Some it did, yes. Yes, it did have -- well, they felt that regardless to what happens, you are not going to win, you know.

[24] Q. If they ran, would they have any problems getting elected under the present system, say like if Mr. Aycock ran? A. Yes. I just don't feel like -- now all I can say is an opinion. This is my opinion. I just don't feel like that a [25] black could get elected under the present system.

[26] Q. Have blacks been able to elect someone to represent them? A. Not in the past.

Cross Examination

By Mr. Brinson:

[50] Q. Well, do you think that if blacks are elected to the city commission that they should represent and look after just blacks? A. No.

Q. They should look after everybody? A. Everybody.

Q. Do you think the whites elected to the city commission ought to look after just whites? A. No. Look after the whole city. But, you see, here's the thing about it: You can -- a black can better represent blacks than a white can, because he can understand. I mean he -- I mean there is a communication.

[60] Q. And how many times has a black that was a good candidate and a qualified candidate buckled up his belt and run in this city? A. Well, we haven't had but one. And as I said, they feel like that they couldn't win.

Re-Direct Examination

By Ms. Jones:

[64] Q. What I am asking--you gave us an examples of -- if you were a member of a church, you would represent that church, and Mr. Brinson would represent another church, and then both churches would have representation. And then you went on to say that blacks, in order to have representation, might need someone who would understand and be able to communicate. Do you think that blacks

presently have that on the city commission in the form of representation, someone who can communicate and understand the black community? A. Let me say this: This is my conviction. This is my conviction, that the blacks and whites still don't have real communication. This is my -- I mean -- period -- because there is still suspicious, you know. If a white person come into my community, I mean, "What is he doing here?" If a black person goes into a white community, "What is he doing here?" You follow me? So you ain't go that trust. You ain't got that real relation.

Q. Do you have that on the city commission? Does the black community have that? A. No, because there is no black on there. They do the [65] best -- let me say this: I am not saying they are not doing the best they can. But then it's a lack of communication.

Q. Are there persons in the community who might better represent you but are not elected or have not been able to get elected? A. Are there blacks --

Q. (Interposing) You are saying the whites that are on the city commission do the best they can. Are there blacks or others who might do better or who might go one step further and have the communication you say the black community needs? A. Maybe I am anticipating what you are saying or am not really following. Are you asking me is there a particular person in the community, or are you saying --

Q. (Interposing) In general. A. -- would blacks --

Q. (Interposing) In general. A. In general. That could represent the black community?

Q. Better. A. Better. Yes, it is.

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Deposition of Reverend Clyde Hill

Direct Examination

By Ms. Jones:

[2] WHEREUPON, REV. CLYDE HILL, after having first been duly sworn, testified as follows:

Direct Examination

By Ms. Jones:

Q. State your full name, please. A. Clyde Hill, Sr.

Q. What is your present address, sir? A. My present address is 1002 Turpin Street, Augusta, Georgia, 30901.

Q. What is your age? A. I am thirty-three.

Q. What is your race? A. Negro, black.

[9] Q. As head of the black coordinating committee, were you ever asked to present the views of the black community or to speak on behalf of the black community in Rome on any given matters? A. What do you mean? The overall populous?

Q. Blacks. Did they ask you to represent them on certain matters, or did whites seek out your opinions about problems in the black community? A. Yes.

[23] Q. Had there ever been a black person in the City of Rome who had ever won any election before? A. Not to my knowledge. Not to my knowledge. And that's what I said what I said a while ago. I could -- you know, you can listen, you can understand, and you can also intantalize (sic) and feel certain things go in the people's minds and hearts, like I say. A lot of people felt helpless and hopeless as far as a black winning in any position because of certain things like, you know, like in my case, the fifty-one percent, you know, majority. And so rather than try and fail, a lot of them just wouldn't try.

Q. You say people felt a black couldn't win; are you speaking of people in general or people in the black community? [24] A. Well, I am speaking now basically in the black community, you know, about the black, you know, didn't stand a chance.

[25] Q. I didn't mean overt statements. Was there anything in your experience living in Rome that would cause you to believe

race was ever a factor in your having lost in a run-off after having won in the general election. [26] A. I think I might have insinuated that that could have been a possibility when I said a while ago that -- I don't know; I will be speculating -- but the votes could have been shifted. You know, you are doing it down now to two people. I did wonder once why would -- since there was such a need -- why would we have -- what was the purpose or motive for three candidates coming in, you know, over against, you know, but I remained -- we got through that. But I wondered why we had three candidates coming in at that particular time and, you know, one black was in it. I did wonder whether or not there was any coming together to shift votes or interest, you know, to one to --

Q. (Interposing) To a run-off? A. Yeah. I didn't know, you know but you think of these things. You wonder and speculate when you have done so well in the primary and then, you know, altogether different in the run-off.

[30] Q. Did you find that your defeat had any effect at all on the black community's ability to elect a person of their choice to office in light of the fifty-one per cent requirement? A. Oh, yes, yes, As a matter of fact Scott and I talked about that. He was my campaign manager. And we realized that it was definitely a hard uphill journey. And he felt like that if you didn't win, the way the people felt about you, there was no chance for a black to get elected with a fifty-one per cent majority. So I think that was somewhat the feelings of others who knew what was required and all,

you know. I mean that was the general feeling at that particular time.

Q. What about young blacks? In the years that you were here, afterwards, did they continue to be as enthusiastic about [31] registering and turning out to vote? A. No. I think a high degree of complacency and lethargy set in.

Q. And what? A. Complacency and lethargy set in after I lost, because like I said about the older ones who felt like if he did that well and didn't get it, you know, what's the use? Who can? That was the general thought. And the young people shared the same. And plus -- now there were some few who were whites who suggested that -- you know, try again. But my concern was not to become a political figure but to become a representative of all the people.

Q. Would you have considered if there had been -- if the fifty-one per cent requirement had been done away with, and you ran at-large, top vote-getter was elected? A. Would I what?

Q. Would you have considered running again after being encouraged by some whites? A. You mean if the fifty-one per cent --

Q. (Interposing) Was dispensed with. A. Yes, I think I would have, especially -- yeah, I think I would have. I wouldn't have wanted to have gone through all of that under the same, you know, setup, but I would have --

Q. (Interposing) Do you think it would have been a bit easier and fairer? [32] A. Sure.

CROSS EXAMINATION

By Mr. Brinson:

[34] Q. Do you think if you had stayed in Rome and continued to work as you did in the community that you might have considered running again and trying that uphill battle? A. If and only if the fifty-one per cent thing had not been there.

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Deposition of Elgin Carmichael

DIRECT EXAMINATION

By Ms. Jones:

[2] WHEREUPON, ELGIN CARMICHAEL, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION: By Ms. Jones

Q. State your full name, please. A. Elgin Carmichael.

Q. What is your present address, Mr. Carmichael? A. 604 Brown Street, Rome, Georgia.

Q. How old are you? A. Fifty-one.

Q. What is your race? A. Negro.

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[7] Q. Have you ever been appointed to any public office? A. Yes. I am presently a member of the Rome City School Board.

Q. When were you appointed to that position? A. Oh, it has been two and a half years ago.

Q. How did that appointment come about? Was there a vacancy on the board? A. Yes. There were two appointments at the same time. Two of the previous members resigned, and I was asked would I accept appointment on it.

Q. Are there presently any other blacks on the school board? [8] A. No.

Q. Have there ever been any blacks on the school board? A. No.

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[10] Q. How would you describe black political participation in Rome? Are blacks politically active in Rome? A. Yes, blacks are active in Rome, but I think there's room for a lot of more activities, politically, by blacks. I think that participation in the overall running of the government -- but I think that blacks are somewhat apathied because of, you know, they are outnumbered seven to one anyway.

Q. Are you talking about in terms of running for office, voting, or registering? A. Right. Right. They feel that, "What's the use of running?" The chances of winning is very -- almost nill.

Q. What would be necessary for a candidate to win in Rome? What is the present system like? A. Well, the system now in the City of Rome is a city-wide election. You run for different posts, and you have to have a fifty-one per cent majority.

Q. Of the total votes? A. Right.

Q. Is that what you were referring to when you said blacks [11] feel that it is unuseful to campaign? A. Well, that's definitely what I was referring to. I think in the past we had Reverend Clyde Hill who ran for the education -- board of education. And he polled -- he was the high man out of five, I believe, if that's correct, if I can remember correctly.

Q. By "high" man, what do you mean by that? A. He had the largest number of votes. But because of the fact he didn't have a fifty-one per cent majority, it threw him in a run-off with the highest or the next of the remainder, and she was a white person, and he lost.

Q. Would that seem irregular to you or to the people in the black community, the fact that he lost? A. Definitely it is irregular. It says that there is not a chance to win.

Q. Why? A. The ratio. People -- let's face it, both blacks and whites vote down racial lines. It has been proven. I think that because of that -- well, he won in the first round, and he was high man. So when they pitted him against another white over here by himself, then the supporters of the other five evidently -- it is obvious that they voted for the white rather than he. And I am sure he must have gotten some white votes to get high man in that election.

[13] Q. Do you know if there are presently any blacks in the Rome community who could get fifty-one per cent of the votes? A. No. I guess that I'm about as popular a black as there is in the community.

Q. Why do you say that? A. Well, my association down through the years has been with [14] -- I would say with the exception of going to school, has been more with whites than blacks because of my job.

Q. What job is that? A. The one I had at the Elks Club and even the one I have now. I come in contact with them. But even with my popularity, I am somewhat in a dilemma as to whether a black can win or not and get fifty-one per cent.

Q. Why? A. Because -- well, let's face it -- and again I repeat that we vote along racial lines.

Q. How do you know that? A. It's obvious. Reverend Clyde Hill confirmed that, you know, when he was high man in the election with five people. And then he was pitted

against another white over here and boom! What happened? He lost.

[15] Q. Even though you are very well-known among whites, both socially and professionally? A. I just don't think that there is no way that I could get elected. I do believe that if we had the system -- if the system was working as to where if I was running against five people, and the five were white, and I was the sixth one, and i was black -- if the five would split the votes up to a point, I think with my popularity, I might could win, if five would split [16] the votes up.

Q. Fifty-one per cent majority? A. No, not with the fifty-one per cent majority. Without that.

Q. You mean top vote? A. Yeah, top vote, high man. I think those five probably would split the votes up. I think I probably would have a chance. But under the system with the fifty-one per cent majority, it won't work.

Q. Why not? A. Because I would have to run against the highest out of the five. And if they are white, because of the racial lines voting, I just wouldn't have a chance.

CROSS EXAMINATION

By Mr. Brinson:

[24] Q. How do you know then that people vote along racial lines? A. Well, it's obvious from the aftermath.

Q. Now you have said it is obvious several times, and I just want to know on what facts you base that. A. On what facts I base it on?

Q. (Counsel nods head up and down.) [25] A. Well, I think -- go back to Reverend Clyde Hill incident. I think that is one specific point. He was high man of the five, and that was because the other four were splitting the votes up among the whites. And then when he was pitted in the run-off with just a white, then he lost.

Q. So that one incident right there makes you think that racial block voting exists in the City of Rome? A. That's the one that comes to my mind right now. I am sure there are others.

RE-DIRECT EXAMINATION

By Ms. Jones:

[45] Q. (By Ms. Jones) Did you not testify that prejudice exists in Rome which causes people, black and white, to vote along racial lines? [46] A. Right.

Q. Did you not say that this prejudice may exist for some time to come? A. Yes.

Q. Based on that, is there anything that could be done that would alleviate the effect that this prejudice has on the voting system in Rome? A. Is there anything can be done?

Q. (Counsel nods head up and down.) A. In the way of --

Q. (Interposing) The election system. A. -- the election system? I think the majority system doesn't give the black man a chance to win. Now I am not that familiar on drawing up an election system. I don't have that much knowledge about it to say what can be done. But it would appear to me from the knowledge I do have that a system whereby high man wins would be a more favorable system, as far as the blacks getting a chance to get elected is concerned.

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Deposition of James Loewen

DIRECT EXAMINATION

By Mr. McGrath:

[3] Q. Could you state your name, please? A. James W. Loewen.

Q. Mr. Loewen, what is your present address? A. 46 Central Avenue, South Burlington, Vermont.

Q. Are you presently employed? A. Yes; I am employed as Associate Professor of Sociology by the University of Vermont.

Q. Could you describe to us your educational background? A. I have a B.A. degree in sociology from Carleton College in Minnesota. That included some undergraduate

work at Mississippi State University. I have a M.A. degree and a Ph.D. degree in sociology from Harvard University.

Q. Dr. Loewen, do you have any background in statistics? A. Yes. I have had a course in statistics and a course in research methods in my undergraduate education. I have had a course in statistics, a course in advanced quantitative methods and other course work in research methods as part of [4] my graduate education. I also used statistical methods during my doctoral dissertation research and in later researches since that time.

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[6] Q. Dr. Loewen, at my request did you attempt to determine whether or not racial block voting existed in Floyd County [7] and/or the city of Rome? A. Yes, I did.

Q. Could you describe to us precisely what you did in an effort to make that determination? A. First of all, you and I discussed --

MR. BRINSON: Excuse me just a minute. I am going to object to that previous question on the grounds that it is a compound question and the answer therefore is not clear. And just by way of edification, of course, my objection is you said Floyd County and or the City of Rome. I don't know whether it is both or which that he has done.

THE WITNESS: You and I discussed the recent elections, let's say in the last ten years,

that have occurred in Rome and in Floyd County. I explained to you the conditions that would have to be met in order to do a scholarly analysis of whether or not racial block voting occurred.

You supplied me with what you represented to be population totally by race for every precinct or voting district, electoral district, in Floyd County, including four that were in, or primarily in, four or five, the town of Rome.

You also supplied me with the vote totals for the 1968 Democratic primary election for United States Senator in which Herman Talmadge, the White candidate, opposed Maynard Jackson, [8] Black candidate, for the Democratic nomination.

To my knowledge, as represented to me by you, this was the only election in which the following characteristics occurred: First, a Black and a White candidate, or candidates, opposed each other; and, second, a number of voting districts were involved, not just one voting district or three or four voting districts; and, finally, neither of the candidates was trivial, or the election was not trivial. In other words, a reasonable number of votes was cast.

I then analyzed these two pieces of information that you had given me.

BY MR. MCGRATH:

Q. Before we go on, Dr. Loewen, let me hand to you two documents and ask if you can

identify them. A. Yes. The first is the population totals for the total population and for the Black population for each of the voting districts or precincts in Floyd County. These were the population totals that I used in computing the independent variable which I used to be percent White in the population by precinct. These totals are, of course, total and Black, and I did an elementary subtraction to obtain the White population and then the percent White.

The second document is the results by precinct for [9] Jackson and Talmadge in the primary election just discussed, and again I did simple arithmetic to determine the percentage of the vote in each precinct that went for Talmadge, the White candidate.

MR. MCGRATH: I would like to have those documents marked respectively Loewen Exhibits for identification 2 and 3.

(Loewen Exhibit No. 2 and Loewen Exhibit No. 3 were marked for identification.)

BY MR. MCGRATH:

Q. Dr. Loewen, what, if any, statistical analysis did you subject this material to? A. I subjected these data to three forms of statistical analysis. First, I looked to see if there was a relationship between the precincts that had heavy White percentages in the population and the precincts that came out with a heavy White candidate vote total. The statistic that I used is the standard statistic that any or

almost any social statistician would begin with: It is called the Pearson product moment correlation coefficient or "r," small "r." I believe it is the most commonly used single measure of association between two variables, and I wish to compute it to find out if there [10] was an association between those two variables. Should I describe what "r" is?

Q. Please. A. "r" can vary from minus 1 through 0 to plus 1. If "r" equals plus 1, that would indicate a perfect positive relationship between the two variables, in this case between the variables percent White in the population and percent of the vote for Talmadge, the White candidate.

A perfect positive relationship, or "r" equals 1.10 would means, then, that if one knew the first variable, percent of Whites in the population, then one could predict the second variable without error. In social science, an "r" of .5 or .6 is considered quite high. An "r" of let's say .2 or .3 would be a mild or a weak relationship. If "r" equals 0, that means there is no statistical relationship between the independent variable and the dependent variable.

I might add that the sign, the direction of the relationship is rather unimportant. For example, a relationship of minus 1.0 would be a perfect negative relationship. Now, in any election, for example, in which we had a relationship of let's say plus .6 between percent White population and percent vote for the White candidate, we would also have minus .6 between percent White population and percent vote for the Black candidate. That's just a statistical certainty that the two would be reversed.

[11] When I calculated "r" for Floyd County for this election, I found it to be plus .832 between percent White in the population by precinct and percent of the votes for the White candidate, Mr. Talmadge. This is a very high correlation coefficient. I might point out this correlation coefficient is not my opinion; this is the correlation coefficient and no matter who calculated it would come out almost with plus .832 for this election. It shows a very high, very strong relationship between White population and voting White.

Q. Other than the correlation coefficient analysis, Dr. Loewen, what, if any, other statistical methods did you subject this data to? A. The second analysis I performed is a straight forward arithmetic exercise. It is called "overlapping percentages analysis." I did this analysis to nail down what percentage of Whites in the county voted White. Overlapping percentages is done by locating or identifying precincts that are extremely high in the first variable, percent White in the population. Then we assume that all of the cross-racial balloting that could occur did occur.

For example, if I take a precinct, Everett Springs precinct, that precinct is 94.4 percent White. Now in that precinct, 97.8 percent of the votes went for the White candidate. 2.2 percent of the votes went for the Black candidate. Now, [12] suppose that all cross-racial balloting that could have taken place did take place. That means we assume that all of the votes for Mr. Jackson came from Whites. That is an unlikely assumption, but we are taking it because we want to be as hard on

ourselves as possible: that is, we wish to compute what is the minimum amount of racial block voting that must have occurred. So we assume that the maximum amount of cross-racial balloting that could have occurred did occur. If all 2.2 percent of the total vote that was for Jackson, if that 2.2 percent came from the White population, then it follows that 94.4 percent of the population being White, that 2.2 percent or 92.2 percent of the population had to have been White and voted White.

I then take that minimum percentage, 92.2, divide by the total White population percentage, which is 94.4, and I come up with a minimum estimate for the percentage of the White population that had to have voted White. In the case of Everett Springs precinct, that percentage is 97.7 percent. Therefore, I can state that the percentage of Whites voting White in Everett Springs precinct is 97.7 percent or more.

Q. Dr. Loewen, let me hand to you a document and ask if you can identify it. A. Yes. I prepared this. These are the minimum percentages of Whites who voted White using the overlapping percentage method for the 11 whitest precincts in the county. [13] The overlapping percentages method is only used for extremely White or extremely Black precincts because that is where it is powerful. There are no extremely Black precincts, and I have listed the 11 whitest precincts.

MR. BRINSON: Excuse me, that last document he referred to is going to be marked Exhibit 4?

MR. MCGRATH: Exhibit for identification, No. 4.

I would like to have it marked as such.

(Loewen Exhibit No. 4 was marked for identification.)

THE WITNESS: Now, I would call your attention to the first precinct, which is 100 percent White. It is, of course, immediately true that 92.4 percent of the Whites in that precinct voted for Talmadge because he got 92.4 percent of the votes in that precinct, and it is nobody voting in that precinct except Whites. Therefore, with certainty, I can state that 92.4 percent of the Whites in Riverside precinct who voted voted White. The other percentages, for example, 87.8 for Alto Park, reading the right-hand column of Exhibit 4, precinct, the minimum percentage of the Whites in that precinct, in this case Alto Park, who must have voted White. The actual probable percentage of Whites voting White would therefore be somewhere between 87.8 percent and 100 percent.

BY MR. MCGRATH:

Q. Dr. Loewen, did you subject the data that we provided [14] to you to any other statistical study? A. Yes. The final statistical analysis I did is called "Goodman Ecological Regression." It is an attempt to be more sophisticated than the overlapping percentages analysis but basically it is an attempt to do the same thing: that is, the Goodman ecological

regression rather than supplying 11 different numbers is based on all of the precincts in the county, including the Town Rome precinct and the rural Floyd County precincts, and using all of them at once comes up with a calculation which provides us with the percentage of Whites voting White in Floyd County as a whole.

I have performed this analysis for the 1968 senatorial primary election that we have been discussing. It indicated that 92.0 percent of the Whites in Floyd County voted White. Now, no statistician can tell for sure that exactly 92.0 percent of the Whites voted White unless, of course, he were within the poll booth with every White voter, and I wasn't. But we can calculate what is called the "confidence interval." The most commonly used confidence intervals in social science are called the 95 percent interval and the 99 percent interval. I prefer to use the more rigid and more accurate 99 percent confidence interval. And I calculated that interval for this guess, this estimate, that I am making with regard to the percentage of Whites in Floyd County that vote White.

When I calculated the stringent 99 percent confidence [15] limit, I found that the interval that is the estimate I would make of percentage of Whites voting White ranged between 88.9 percent and 95.1 percent. Therefore, although I called this an estimate, I am quite confident that between 88.9 percent and 95.1 percent of the Whites in Floyd County voted White.

Q. Did you attempt to calculate the percent of the Black population in the county that voted Black? A. Yes, I did the same

Goodman ecological regression analysis for the Black population and I found that approximately 76.2 percent of the Black population in the county voted Black. That is a high proportion, but it is substantially less than the 92 percent of block voting found among the White population. I would conclude in short, then, that the White population in Floyd County did block vote in this election.

I might point out that all three of these methods of analysis -- the correlation coefficient, the overlapping percentages and the Goodman ecological regression -- came out the same and support each other. For example, my estimate of 92.0 percent for the entire county is very, very close to my certain statement that 92.4 percent of the Whites in Riverside precinct voted White: that being the 100 percent White precinct.

***

Q. Dr. Loewen, what relevancy, if any, would your finding with respect to Floyd County have with respect to the city of Rome? [16] A. Well, I would first point out that, of course, Rome is part of Floyd County and a substantial part in terms of population; that it makes up four or five of the voting districts; that if Rome behaved differently from the county as a whole, this behavior would have been enough to throw off the correlation coefficient or the Goodman ecological regression estimate. So I feel confident that Rome behaved similarly to the county analysis as a whole and that therefore the citizens of Rome are participating, particularly the White citizens, in racial block voting.

***

Q. Dr. Loewen, let me ask you this: What impact, if any, would racial block voting have? A. Well, in an election in Floyd County or Rome characterized by racial block voting, victory by a Black candidate would be essentially impossible because if Whites are block voting and Whites make up a population majority in both the county and in the town of Rome, then it would be impossible for Blacks to win an election. Therefore, the effect of racial block voting upon Black political participation would be to cut it down because Blacks would know that Whites are block voting. I am sure these statistics, although they are perhaps not scientifically analyzed within the county, I am sure they are known offhandedly to every resident of the county who is politically informed; and therefore, any Black resident would be aware that there is a certain paradox involved in political !171 participation: namely, it is unlikely to be successful.

Q. Is this just your opinion, Dr. Loewen, or an opinion shared by others? A. No, this is my opinion based on my analysis of this community and of other counties throughout the South; and it is also rather standard opinion. For example, the most common and widely cited book on the subject of political participation in America is in fact called "Participation in America." It is by Sidney Verba and Norma Nie, a 1972 publication; and they state that Blacks in the South participate less than Blacks in the North even when social class is controlled for. They state, and I quote: "Clearly this reflects the fact that historical legal discriminations against Blacks voting in the South still make a difference."

They also examine the relationship between Black voters or non-voters and elected officials in the South, and they find that Blacks feel less able to contact local officials and that contacting local officials would be less efficacious for them. They conclude, and I quote: "The data add up to a picture of frustration for Blacks."

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CROSS EXAMINATION

BY MR. BRINSON:

[28] Q. Would you say that in statistics, Dr. Loewen, can one race indicate a trend? A. Yes. That is partly because of the power of the three different statistical analyses that I subjected this race to. In other words, the findings of racial block voting in this election were not mild and they were not my opinion; they are in the data. If anyone else calculated the overlapping percentage analysis or any of the other two statistical analyses as I did, they would come out with exactly the same conclusion.

Q. That conclusion is that Whites voted White? A. That's right.

Q. But not that racial block voting exists in the city of Rome? A. Well, Whites voting White is certainly at least [29] half of what we mean by "racial block voting."

Q. At least half. What is the other half? A. Blacks voting Black; and Blacks did vote Black, 76 percent of them--not as high a percentage as of the Whites.

Q. Do you consider any other factors other than statistics when you opine as to the existence or not of racial block voting? A. Racial block voting is an emperical and statistical question. I looked to see whether it occurred, and the two races involved are the White and the Black. If the Whites voted White, that is to me a definition of part of racial block voting; if the Blacks voted Black, that is a definition of racial block voting.

***

[33] Q. Dr. Loewen, were you given any figures of any other elections in Floyd County or the cty of Rome? A. Yes.

Q. What elections? A. I don't remember them by name. There was one election, for example, in which all of the citizens of Rome voted at one precinct, so that there seemed to be only one case. There was another election of a Republican primary.

Q. Do you remember when the last one was that you mentioned? A. No, I don't.

Q. Rev. Hill ring a bill with you, in 1970? A. Was that the election in which -- for school board?

Q. Yes. A. Yes.

Q. That's the one? A. Well, in that election I believe there was either one or four voting places. In either case, four is not enough [34] voting places to allow me to subject the data to a statistical analysis.

Q. But five are? A. Well, five or six might be, particularly if there is a wide variation in the percent White or the percent Black at those five or six various polling places. If you have, for example, one polling place, it is obviously no way for me, since I wasn't there, to determine how the Whites voted versus how the Blacks voted. If you have exactly two polling places, even if one of them is predominantly Black and the other predominantly White, the correlation coefficient, for example, cannot be calculated, because what the correlation coefficient amounts to is -- if we could visualize it -- is this: We place all of the different precincts on a scatter diagram. We set up a simple graph paper with percent White in the population going across the bottom, percent White vote going along the side or going up. And we put a dot for each precinct. Now if the precinct is low in percent population that is White, then it would be towards the left; and if it were low in percent of votes for White candidate, then it would be towards the bottom. If there was a relationship between those two variables, we would expect the dots then to move up and to the right in an ordered straight line.

The correlation coefficient tells us how close we are, how close those dots are to such a straight line. If you had [35] just two precincts, you would have -- let's say one of them were largely White and the other one were very small in percent White, you would have only two dots. And regardless of where they fell with regard to vote for the White candidate, a straight line could be drawn between those two dots and the rest of the dots would not deviate from that straight line because there

would be no other dots if we only had two precincts, of course. So therefore the correlation coefficient is trivial in the case of two precincts.

It will always come out 1.0 or minus 1.0. Similarly, for three or four precincts, you could immediately see that -- you can draw a line, let's say for three precincts that would go through two of the dots and the third dot might be fairly close; and if it were, it would look like a high correlation coefficient. It would look like we really proved something, but since only three or four dots are involved, that high correlation coefficient was partly caused by the fact that you are determining the line with so few dots, so it would not be fair; it would imply a high block voting even though you didn't know it. That is why to really analyze block voting you need five or six cases at the absolute minimum, and that is enough only in the case where you have rather disparate percentages of White in the population. It is much better to use 10 or 12 or 15 cases.

Q. What other elections did you consider? [36] A. Well, I don't know the elections by name because I considered them and rejected them and therefore didn't study them. I remember one. There was a Republican primary in which there were two or three hundred, I believe, votes cast in the entire primary, and, of course, with that few votes cast, they could have all been cast by Blacks, let's say, or all have been cast by Whites, so few votes involved that that would be trivial. So I didn't analyze it; it would be misleading.

Q. Well, you said it would be trivial. Would it be irrelevant? A. Yes.

Q. Absolutely irrelevant? A. To the question of racial block voting in the county?

Q. Yes. A. I think so, because you don't have the county voting in such a selection. You have such a tiny fragment of the county population that was voting that I certainly didn't bother to attempt to ascertain how the tiny fraction voted.

Q. Not in the county. We are talking about the city of Rome. A. Yes.

Q. You have indicated -- A. Two or three hundred votes is a trivial proportion of the city's voting population. So if I found racial block voting, I would not attempt to generalize from the election of [37] only 300 votes or so.

Q. If it was inconsistent with your finding of racial block voting, what if it indicated that racial block voting in that particular race did not exist; would it be irrelevant? A. Yes, it would be irrelevant because it is based on such a tiny vote total. You see, we wouldn't even be able to ascertain that -- let's imagine we had a precinct which we don't even have, a precinct that was 95 percent Black with this Republican election of just a few hundred votes. Such a precinct might have, let's say, 30 or 50 votes correct? And all of those votes, even in the 95 percent Black precinct, might have come from the White voters in the precinct because there is so few votes that they do not

represent any significant proportion of the voters.

Q. So what you are saying is that it cuts down on the reliability but it doesn't nullify the reliability, does it? A. An election of 300? Well, I suppose that I would be overstating it to say it nullifies it.

Q. So it would be another factor, whether a substantial one, it would be another factor that could be considered. A. It could be considered. It would be of minimal importance.

Q. And you did not consider it? A. I did not consider it.

Q. That Republican race was a local election in the city [38] of Rome, too was it not? A. I don't remember. When I saw the vote total, I had no further interest in it, and I don't remember.

Q. Do you know whether or not it was for Rome City Commission? A. I don't.

Q. You do know that it was not a federal election of such for the United States Senator? A. I don't think so, but I just don't remember what the contest was.

Q. What other elections did you review? Excuse me, let me ask you: That Republican primary was, you did know it was between a White and Black candidate, did you not? A. I believe that counsel for the Justice Department told me that, but at this time I don't even remember that for sure.

Q. What other elections did you consider? A. I believe I rejected one or two others. I don't remember what other. I rejected at least one for which there was exactly one precinct, and I don't remember what election that was; but I would have rejected any election for which there was one precinct because the statistical analysis cannot be attempted for each election.

[40] Q. Did you consider the factor that the United States Senate election was a federal election as opposed to a Rome City Commission or Rome Board of Education local election? A. In my analysis in, for example, Forest County, Mississippi, I found that elections behaved similarly whether they were the local Forest County segment of a state-wide or a larger election or whether they were for County Board of Supervisors or justice of the peace. Therefore, I had no apriori reason to assume that this senatorial primary would be an instance or would not be an instance of racial block voting compared to a local election.

Q. But you didn't investigate that? A. I investigated this election to see whether there was racial block voting. I didn't investigate any other election. It was alleged to me that there was no other election in which a substantial number of precincts existed where a Black and a White candidate squared off and a substantial number of votes were cast.

Q. Well, that didn't make any difference to you anyway, though, I believe you testified. A. That is exactly what made the difference. That is why I did not investigate other elections that were discussed with me.

Q. Because -- A. Because those three conditions did not obtain.

****

[41] Q. You have in making your findings of block voting made the determination as to Floyd County; is that correct? A. Yes.

Q. And you find that block voting exists in Floyd County? A. That's correct.

Q. Based upon your review of election results of one election in the 24 voting precincts in Floyd County. [42] A. Yes.

Q. And how did you get from that stage to finding that racial block voting exists in the city of Rome? A. If racial block voting -- well, I can state racial block voting existed in the city of Rome for that election because if it did not, then the correlation coefficient for the county would have been much lower and the Goodman ecological percentage which calculates the percentage of Whites voting White for the county would have been much lower. So my first reason for saying that is because Rome is part of, an important part of the totals for Floyd County. Secondly, in my experience of doing ecological voting analysis in Mississippi and elsewhere, I have virtually always found it to be the case that contiguous districts show similar patterns, and this case we are not even talking about contiguous districts; that is, we are not saying that Rome is contiguous to Floyd County, but it is subsumed within Floyd County. So I believe it is for this reason also a reasonable inference.

[45] Q. Now, you stated I believe if Rome behaved differently in an election from Floyd County as a whole, it would flow off the findings of the two analyses that you did. A. That's correct.

Q. What are those two analyses? A. The first and third: the correlation coefficient and the Goodman ecological regression analysis.

Q. And in that connection, what did you do to investigate if Rome did behave differently or would have likely behaved differently? A. Nothing. I didn't have to. The correlation coefficient was quite high and the Goodman ecological regression calculation for percent White was quite high.

Q. For Floyd County? A. That's correct. But my statement was if Rome behaved differently from Floyd County including Rome, then those numbers could not have been high. You want me to explain that?

Q. Yes. A. It is mathematically impossible that they could have been high. We could go back to my imagery of the graph paper with a whole bunch of dots going from low percent White to high percent White in the population.

The Rome precincts are comparatively low in percent White compared to these 80 and 90 percent White precincts and 100 White precincts that are found outside of Rome. If they [46] behaved differently than the precincts outside of Rome, then a straight line that was drawn to connect or come near to the dots coming from Floyd County outside of Rome

would be nowhere near the dots from Rome itself. They would lie somewhere off that line. For example, since they are rather low, several of them, in percent White, they would be presumably not similarly low in percent vote for Talmadge. They would either be much lower or much higher and in some way they would be off of the line. If they deviated from that line, then the correlation coefficient would not come up to be extremely high as it did because that is what it is a measure of.

Q. And that is applicable to that particular election? A. Yes, that is what it was calculated as a result of. [58] I can state that in the 1968 election Rome racially block voted and Floyd County racially block voted.

RE-DIRECT EXAMINATION

By Mr. McGrath:

[65] Q. Let me ask you something, Doctor. I ask you which of the following statements would you say is more accurate or reflects the truth if you were making the statement: In my opinion, in the 1968 election Whites in Floyd County voted for Talmadge and Blacks in Floyd County voted for Jackson. In the 1968 election Rome voted along racial lines. A. Both of those statements are true, I believe. I would state both of them except I would qualify the second statement by pointing out I testified that I believe 76 percent would be my estimate of Blacks voting for Jackson in either Floyd County or -- that would be my best guess for Floyd County or for Rome.

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NEITHER A MOTION TO DISMISS NOR A MOTION TO AFFIRM WAS FILED BY THE APPELLEES IN THIS CASE.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1840

CITY OF ROME, BRUCE HAMLER, AND H. F. HUNTER, JR.,
Appellants,

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
Appellees.

On Appeal From the United States District Court for the District of Columbia

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1840

CITY OF ROME, BRUCE HAMLER, AND H. F. HUNTER, JR.,
Appellants,

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
Appellees.

On Appeal From the United States District Court for the District of Columbia

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BRIEF FOR THE APPELLANTS

This case requires determination of the impact of Section 5 of the Voting Rights Act of 1965 (the "Act"), under its terms and the Constitution, upon a political subdivision innocent of purposeful racial discrimination. The Act, as administered by the Justice Department, has prevented elections in the City of Rome for over four years. Appellants seek to restore democratic government to the citizens of Rome.

Appellants submit that a variety of corrective determinations are available to this Court, including construction of the Act in a manner that does not proscribe actions innocent of illegal purpose, exemption of Rome from the Act, declaration of Section 5 as now unconstitutional, and finding that the matters at issue have, in fact, been approved by the Attorney General of the United States. Section 5 of the Act was designed to insure that the goals of the Fifteenth Amendment would no longer be frustrated by undemocratic devices. Section 5 has become, in effect, an affront to the principles of constitutional Federalism, the inherent right of American citizens lawfully to conduct their local governmental affairs, and the consensual belief that parties, themselves proven innocent, ought not categorically be presumed guilty.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia rendered on February 22, 1978, which appears beginning at p. 1a of Appellants' Jurisdictional Statement, is reported in 450 F. Supp. 378 (D.D.C. 1978). The opinion of that court rendered on April 9, 1979, which appears beginning at p. 1b of Appellants' Jurisdictional Statement, is presently unreported.

JURISDICTION

This suit seeks a declaratory judgment pursuant to Section 4 of the Voting Rights Act of 1965 (the "Act"), 42 U.S.C. 1973b, and Section 5 of the Act, 42 U.S.C. 1973c. On February 22, 1978, the three-judge district court dismissed the portion of Appellants' complaint which contended that the Attorney General of the United States unconstitutionally applied Section 5

of the Act to the City of Rome. 450 F. Supp. 378 (D.D.C. 1978). See Jurisdictional Statement at 13a (hereinafter cited as "Juris. State."). On April 4, 1979, the court denied Appellants' motion for summary judgment, granted the motion for summary judgment of Appellees with respect to the balance of Appellants' complaint, and dismissed Appellants' case. See Juris. State. at 1b. A notice of appeal to this Court was duly filed in the United States District Court for the District of Columbia on May 2, 1979. See Juris. State. at 1f.

An appeal was docketed in this Court on June 7, 1979, within ninety days from the final order of the court below dismissing the case. The Appellants' Jurisdictional Statement was filed on that date, invoking the jurisdiction of this Court under 42 U.S.C. § 1973b (a) and 42 U.S.C. § 1973c. This Court noted probable jurisdiction in an Order dated July 2, 1979.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Article IV, Section 4, and the First, Fifth, Ninth, Tenth, Fourteenth, and Fifteenth Amendments of the Constitution of the United States of America are set forth in full beginning at p. 1a *infra*.

Section 4 and Section 5 of the Voting Rights Act of 1965, Pub. L. No. 89-110, Title I, §§ 4 and 5, 79 Stat. 438-439, *as amended by* Pub. L. No. 91-285, §§ 3-5 (June 22, 1970), 84 Stat. 315, *as amended by* Pub. L. No. 94-73, §§ 101, 201-203, 204, 206, 405 (Aug. 6, 1975), 89 Stat. 400-402, 404 [codified at 42 U.S.C.A. §§ 1973b and 1973c (Cum. Supp. 1974 to 1978)], are set forth in full beginning at p. 1c of Appellants' Jurisdictional Statement. Certain provisions of the Georgia Munici-

pal Election Code, which were precleared by the Attorney General of the United States, 1968 GEORGIA LAWS 885, 887, GA. CODE ANN. § 34A-102 (1970); 1968 GEORGIA LAWS 885, 913-914, GA. CODE ANN. § 34A-902 (1970); 1968 GEORGIA LAWS 885, 977-978, 1970 GEORGIA LAWS 341, 344, 1974 GEORGIA LAWS 82, 94, 1978 GEORGIA LAWS 1025, 1031, GA. CODE ANN. § 34A-1407 (Cum. Supp. 1979), are set forth in full beginning at p. 1d of Appellants' Jurisdictional Statement. The changes to the Charter of the City of Rome which have been objected to by the Attorney General, 1966 GEORGIA LAWS 2375-2378, 2382-2386, 2815-2819, 3083-3087; 1967 GEORGIA LAWS 3296-3298; 1970 GEORGIA LAWS 2563-2566; 1971 GEORGIA LAWS 3664-3666, are set forth in full beginning at p. 1e of Appellants' Jurisdictional Statement.

Part 51 of the regulations of the Department of Justice, 28 C.F.R. Part 51 (1978), *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965*, is set forth in full beginning at p. 1b *infra*.

QUESTIONS PRESENTED

1. Whether electoral changes and annexations, enacted without discriminatory purpose, are prohibited by Section 5 of the Act.
2. Whether municipalities located in states covered by the provisions of the Act can independently bailout from the coverage of the Act.
3. Whether Congress is empowered, pursuant to Section Two of the Fifteenth Amendment of the Constitution, to prohibit electoral changes and annexations found to be enacted without discriminatory purpose.

4. Whether Section 5 of the Act intrudes upon basic concepts of Federalism and rights guaranteed by the First, Fifth, Ninth, and Tenth Amendments of the Constitution.
5. Whether the Attorney General of the United States precleared the electoral changes and annexations presently before the Court.

STATEMENT

This action is brought by the City of Rome, a municipality situated in Floyd County, northwestern Georgia. Despite findings by the court below that Rome is innocent of any purposeful discrimination and that Rome has not used any test or device to deny or abridge the right to vote, that court refused to approve the electoral changes and annexations here at issue and refused to exempt Rome from the Act.

I. Parties to this Action.

Rome is a city of 30,759 persons, of whom 23,543, or 76.6 percent, are white and 7,216, or 23.4 percent, are black. Juris. State. at 4b. The voting age population is 79.4 percent white and 20.6 percent black. *Id.*[1] As of 1975, Rome had 13,097 registered voters, of whom 83.9 percent were white and 15.5 percent were black. *Id.*

The Rome city government's behavior with respect to black citizens was described by Judge Carl McGowan, writing for the three-judge court below. He determined that no test or device, as that term is defined in the Act, had been used in Rome to deny or abridge the right

[1] This population data was developed from the 1970 census. Juris. State. at 4b.

to vote for at least seventeen years. *Id.* at 5b. Judge McGowan also determined that Rome carried its burden of proving that the electoral changes were enacted without a racially discriminatory purpose, *id.* at 32b n.69, 45b, and noted that the United States admitted the absence of any racially discriminatory purpose for the annexations. *Id.* at 49b.

Supporting the court's two central determinations were eighteen subsidiary findings of fact describing the City's behavior: (1) "no literacy test or other device has been employed in Rome as a prerequisite to voter registration during the past seventeen years," *id.* at 5b;[2] (2) "the City has not employed other barriers to registration with respect to time and place, registration personnel, purging, or reregistration," *id.* at 6b; (3) "there have been no other direct barriers to black voting in Rome," *id.* at 7b; (4) "[i]ndeed whites, including City officials, have encouraged blacks to run for elective posts in Rome," *id.*; (5) "white elected officials of Rome, together with the white appointed City Manager, are responsive to the needs and interests of the black community," *id.*; (6) "[t]he City has not discriminated against blacks in the provision of services," *id.*; (7) "[the City] has made an effort to upgrade some black neighborhoods," *id.*; (8) " the City transit department, with a predominantly black ridership is operated through a continuing City subsidy," *id.* at 6b; (9) "the racial composition of the City workforce approximates that of the population, with a number of

[2] Indeed, the uncontradicted evidence, indicating the absence of the use of any such test or device, including a literacy test, extends at least forty years, this being the period of memory of living registration personnel and black citizens. Juris. State. at 6b and footnotes contained therein.

blacks employed in skilled or supervisory positions," *id.* at 7b-8b; (10) "[i]n Rome politics, the black community, if it chooses to vote as a group, can probably determine the outcome of many, if not most contests;" *id.* at 8b, (11) "blacks often hold the balance of power in Rome elections," *id.* at 55b; (12) "[t]hus many white candidates vigorously pursue the support of black voters," *id.* at 8b, *see also id.* at 55b; (13) "[blacks] are situated to assert considerable influence over many elected officials, not simply those representing an exclusive black constituency," *id.* at 55b; (14) "[a]lso probative of the lack of discrimination in registration is the fact that black registration remained at a relatively high level throughout the period 1963-74," *id.* at 6b; (15) "[b]lacks have not been denied access to the ballot through the location of polling places, the actions of election officials, the treatment of illiterate voters or similar means," *id.* at 7b; (16) "a black . . . was appointed to the Board of Education when a vacancy occurred in that body," *id.* at 7b; (17) "[s]everal present Commissioners testified that they spent proportionately more time campaigning in the black community," *id.* at 8b; and (18) "[n]or is there any evidence of obstacles to black candidacy with respect to slating of candidates, filing fees, obstacles to qualifying, access [of] voters [to] polling places, or the like," *id.* at 7b.

Rome is administered by a council-manager form of government. *Id.* at 4b. Appellant Bruce Hamler is the Rome City Manager, and Appellant H. F. Hunter, Jr. is Chairman of the Rome City Commission. *Id.* Appellants Hamler and Hunter have participated in this action both in their official and individual capacities. App. at 14. Their individual claims arise from the fact that operation of the Act has prevented municipal elections in Rome for over four years. Juris. State. at 42b.

The United States is a party defendant by virtue of 42 U.S.C.A. § 1973 (1974 & Cum. Supp. 1974 to 1978); App. at 15. The Attorney General of the United States and the Assistant Attorney General of the United States are parties to this action because Appellants' action seeks, in part, to establish that their application of Section 5 to the City of Rome was unconstitutional. App. at 33-36.

II. The Electoral Changes at Issue.

The basic structure of Rome's government was established by a Charter enacted in 1918 by the Georgia General Assembly. Juris. State. at 4b.[3] The Charter provided for a Commission of seven members, one from each of seven wards, elected concurrently, at-large, and by plurality vote. *Id.* The same Charter established a Board of Education, consisting of five members elected concurrently, at-large, and by plurality vote, *id.*; there was no residency requirement for the Board of Education. *Id.* In 1929, two additional wards were annexed to the City, making a total of nine, and seats for these new wards were provided on the City Commission. *Id.*

In 1964, the State of Georgia enacted the Georgia Election Code, which established a majority vote requirement for victory in state and county elections. 1964 Georgia Laws 174 (current version at *Ga. Code Ann.* § 34-1513 (Cum. Supp. 1979)). Although the Code

[3] In Georgia, a city charter is a state law of local application. While cities have some home rule powers, changes in electoral processes can only be made by the Georgia General Assembly. Hence, the electoral provisions of which Rome sought preclearance are laws of the State of Georgia. GA. CODE ANN. § 69-1018 (1976). See Second Supplement to Parties Stipulation of Facts, Exhibits 38, 39, 41.

did not apply to municipalities within the state, the then City Attorney viewed it as a guide to the conduct of city elections and, indeed, he mistakenly believed that the Code required Rome to impose a majority vote provision. Juris. State. at 47b; Deposition of Horace Clary at 54-55 (hereinafter cited as "Clary Deposition"). Such a requirement was thus recommended by him to the City Commission. App. at 246-249.

Differences in growth patterns and rates of growth within the City caused the nine wards, as of 1965, to vary widely in size and population, and these disparities were perceived by the City Attorney to produce both practical and legal difficulties. Clary Deposition at 27-30. One Commissioner responded to 10,000 ward constituents, while others to less than 1,000. *Id.* at 28. The legal difficulties arose from this Court's "one man-one vote" decisions and the consequent belief that the disparity was unconstitutional. *Id.*[4]

Thus, in 1965 the City Attorney also recommended to the City Commission that the wards be redrawn to represent more evenly the population distribution. App.

[4] At the time of the City Attorney's initiation of the voting changes at issue, it will be remembered that the "political thicket" had been entered three years earlier, and voting principles were undergoing significant changes. See Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Dusch v. Davis, 387 U.S. 112 (1967). Many jurisdictions were reexamining their electoral systems at the time. *See* Sentell, *Reapportionment and Local Government*, 1 GA. L. REV. 596 (1967). Specifically, Dusch v. Davis, 361 F.2d 495 (4th Cir. 1966) *rev'd*, 387 U.S. 112 (1967) held unconstitutional the at-large election system of Virginia Beach, Virginia, which also imposed a residency requirement in each of its seven boroughs, varying greatly in population. Rome's at-large system, with a residency requirement, was very similar to that of Virginia Beach and would have been subject to the same argument. See Deposition of H. F. Hunter, Jr. at 8.

at 247. A reduction to three wards was proposed. *Id.* The geography of Rome provided a natural division of the City into three parts because three rivers, the Etowah, the Oostanaula, and the Coosa, have their confluence at Rome. *Id.* Each of the three proposed wards would have reasonably approximated the other in population, and, thereby, each voter's ballot would have approximately the same weight in determining the City Commission and Board of Education. *Id.*

The City Attorney was also concerned with the possibility of complete replacement of all Commission members in a single election. Clary Deposition at 45-47. This had occurred in Floyd County government and, in his judgment, had caused serious difficulties. *Id.* at 45. Therefore, he recommended the institution of staggered terms so that only a portion of the Commission seats would be subject to the same election. *Id.* at 47; App. at 248. For similar reasons, a system of designated offices or "numbered posts," was recommended. Clary Deposition at 51-54; App. at 248. This made possible the institution of staggered terms in a multiple ward system by guaranteeing continuity at the ward level. Clary Deposition at 54.[5]

[5] The reason given by the court below for the institution of numbered posts was the City Attorney's mistaken belief that such a system was required by state law. Juris. State. at 47b. The court commented in a footnote that the City Attorney had linked a numbered post provision to the need to facilitate the division of the Commission into committees. *Id.* at 47b. n.87. The court suggested in that same note that a more likely explanation was the need to facilitate majority voting. *Id.* Careful analysis of the Clary Deposition supports the reason offered in the text above. In any event, the court found the change to have an innocent purpose. See App. at 201-204.

Beginning in 1966, Rome's Charter was amended by the Georgia General Assembly to provide a majority vote requirement for Commission and Board of Education general and primary elections and for the conduct and timing of run-off elections; to reduce the number of wards from nine to three; to provide for one Commissioner from each of three numbered posts in each of three wards; to increase the membership of the Board of Education from five to six; to provide for one Board of Education member from each of two numbered posts in each of three wards and to provide that each candidate must be a resident of the ward in which he ran; to stagger the terms of the Commission and Board of Education members; to ease restrictions on voter qualifications as to payment of city taxes; and to transfer voter registration responsibility to Floyd County. Juris. State. at 4b-5b.

In 1968, the Georgia General Assembly enacted the Georgia Municipal Election Code, which applies to all municipal elections in Georgia. *Ga. Code Ann.* § 34A-102 (1970); Juris. State. at 1d. The new Code provided for the use of numbered posts in municipalities which fill more than one identical public office during the same election. *Ga. Code Ann.* § 34A-902 (1970); Juris. State. at 1d. It also established a state-wide majority vote requirement unless otherwise provided for in a city's charter and a procedure for the conduct of run-off elections. *Ga. Code Ann.* § 34A-1407 (Cum. Supp. 1979); Juris. State. at 1d-3d. All of these provisions were submitted to the Attorney General by Georgia, see App. at 98, 100, and were precleared. See App. at 53-56.

III. The Annexations at Issue.

From 1964 through 1973, as a result of its natural growth, Rome effected 60 annexations. Thirteen of these annexations are at issue in this case. Set forth below is the calculation by the court of the persons residing within each of the annexed areas:

Annexed Area	Population by Race				Voting Age Population				No. Registered Voters			
	At Annexation		February 1978		At Annexation		February 1978		At Annexation		February 1978	
	White	Black	White	Black	White	Black	White	Black	White	Black	White	Black
Saddle Mountain	0	0	78	0	0	0	141	0	0	0	134	0
Holmes Acres (E. 11th Ext.)	144	0	263	0	95	0	174	0	31	0	98	0
Lyons Drive West Rome	78	3	315	28	51	1	208	16	8	0	35	6
Georgian—Old Salem Apts.	0	0	295	6	0	0	195	3	0	0	42	1
Battey Hospital	35	0	32	0	21	0	21	0	8	0	11	0
Maplewood Square	0	0	84	0	0	0	55	0	0	0	42	0
Garden Lakes Rollingwood	0	0	172	0	0	0	114	0	0	0	38	0
Berkshire Estates	0	0	112	0	0	0	74	0	0	0	61	0
W.A. DuPre—Rockmart Rd.	0	0	321	8	0	0	222	2	0	0	49	1
Westminster Apts. Harry Butler	0	0	220	10	0	0	138	3	0	0	49	1
Castle Cove Subdivision	0	0	95	0	0	0	63	0	0	0	14	0
Saddle Mt., Sec. 4 Bill DuPre	0	0	84	0	0	0	55	0	0	0	47	0
Old Airport Community	781	0	511	0	515	0	337	0	241	0	203	0
TOTALS	1,038	3	2,582	52	682	1	1,797	24	288	0	823	9

Juris. State. at 52b.

The Appellees have admitted that these annexations were effected without discriminatory purpose. Juris. State. at 49b. The court below noted this admission but nevertheless refused to preclear these annexations because of an asserted reduction in the proportion of black registered voters in Rome.[6] Under the court's findings and its presumption of racial bloc voting, see *id.* at 54b, the annexations have allegedly diminished proportional black voting strength by a factor of .009 (15.6% to 14.7%), or approximately 117 persons.[7] As

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[6] The annexations occurred separately and without any unified objective over a period of at least eight years, App. at 66, and would have been sustained as having "*de minimis* effect only," see Juris. State. at 53b, if considered separately; however, the court below treated them as cumulative and as having been made currently. *Id.* In view of the finding of the absence of discriminatory purpose, such cumulative treatment is an improper expansion of Section 5. Nevertheless, the court found it "eminently fair in light of . . . the delay . . . [caused by] Rome's initial failure to comply with the Act by submitting them when they occurred." *Id.* However, Appellants note that at least ten of the annexations occurred before the decision in Perkins v. Matthews, 400 U.S. 379 (1971). App. at 66. Even the "single and unified whole" found by the court resulted in only an asserted 0.9% change. The court's holding was, thus, contrary to the observation in City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), as to the impact of the Act upon annexations, which observation was expressly approved in City of Richmond v. United States, 422 U.S. 358, 368-369 (1975).

[7] In finding the "effect" of the annexations to be "significant," the court noted that as of February, 1978, the annexed areas contained 2,528 whites, 832 of whom were registered to vote, and 52 blacks, only 9 of them registered. By comparison, in 1975, the registered voters in the City as a whole totalled 10,982 whites and 2,026 blacks. Thus, the court inferred that presently close to 10% of the white voters, and virtually no black voters, reside in the annexed areas. The court's inference seems to be that dilution resulted from the addition of 823 "new" white and only 9 "new" black voters by virtue of the annexations. There is no evidence to support this inference. A more likely inference from the record

shown below, other findings by the court, however, indicate that during the period of the annexations, 1964 through 1973, the relative proportion of black voters actually increased from 18.45% (1963) to 19.0% (1974):

Year	Totals By Race White	Black	Total Registered Voters
1963	8097	1832 [18.45%]	9929
1964	8313	1864 [18.31%]	10177
1965	11241	2637 [19.00%]	13878
1966	9182	2154 [19.00%]	11336
1967	9532	2236 [19.00%]	11768
1968	10585	2483 [19.00%]	13068
1969	9906	2324 [19.00%]	12230
1970	11081	2599 [18.90%]	13680
1971	9969	2338 [18.90%]	12307
1972	10481	2458 [18.90%]	12939
1973	10080	2365 [19.00%]	12445
1974	10610	2489 [19.00%]	13099

Juris. State. at 66.

is the demographic reality that many voters in the annexed areas moved from other areas of the City and hence were not "new" voters.

Appellants' determination of the court's calculation of dilution is made by adding the 1978 voters within the annexed areas to the 1975 data and then computing the racial proportions. Appellants vigorously dispute the validity of this calculation, for the reasons stated herein, but the resulting "dilution" is, in Appellants' view, nonetheless *de minimis*.

The disparity between these two portions of the court's opinion results from the fact that the ultimate finding of a "significant" impact, *id.* at 54b, of the annexations rested on the differential in black registered voters between 1975 and 1978, when, in fact, all annexations had taken place prior to 1975. App. at 66.

It is also significant that among these 13 annexations, nine of them contained no persons at the time of annexation, Juris. State. at 52b, and the annexation of the "Old Airport Community," the largest, was effected by the Georgia General Assembly over the objection of the Rome City Commission in order to eliminate an unincorporated "island" within the City that had not previously been provided city services. App. at 207.

IV. Elections Held Under the Changes at Issue.

In 1967, Rome conducted an election for members of the Rome Board of Education, in accordance with the 1966 Charter amendments. Juris. State. at 11e; App. at 71. In 1968, Rome conducted an election for the City Commission in accordance with the 1966 and 1967 Charter amendments. Juris. State. at 1e. In 1970, Rome conducted elections for both the Board of Education and the City Commission, in accordance with the 1966, 1967, and 1970 Charter amendments. Juris. State. at 2e, 11e, 23e; App. at 71, 74-79. In 1972, Rome conducted elections for both the Board of Education and the City Commission, in accordance with the 1966, 1967, 1970, and 1971 Charter amendments. *Id.* In 1974, Rome conducted elections for both the Board of Education and City Commission in accordance with the 1966, 1967, 1970, and 1971 Charter amendments. Juris. State. at 2e, 11e, 23e, 25e; App. at 71. This was the last election that has been held in Rome.

V. Administrative and Judicial Proceedings.

In 1969, this Court decided *Allen* v. *State Board of Elections,* 393 U.S. 544, 566-567 (1969), which gave Section 5 the "broadest possible scope," and, thus, determined that changes such as those presently before the Court must be precleared. On January 14, 1971, this Court decided *Perkins* v. *Matthews,* 400 U.S. 379 (1971), which held that annexations by cities covered by the Act constitute "changes" and must be submitted for preclearance. In September, 1971, the Justice Department first adopted regulations implementing Section 5's preclearance provisions. *United States* v. *Board of Commissioners,* 435 U.S. 110, 148 (1978) (STEVENS, J., dissenting) (hereinafter sometimes cited as *Sheffield*).[8] Pursuant to these determinations, the electoral changes and annexations here at issue were submitted to the Attorney General for preclearance in a series of communications and correspondence beginning in 1974, which was substantially completed by August 21, 1975. App. at 107-138; 207-209.

An objection to Rome's submission was entered October 20, 1975, but the Attorney General did not object to the reduction of the number of wards from nine to three or to the provisions for the conduct of run-off elections. *Id.* at 139-143. On May 24, 1976, Rome requested reconsideration. *Id.* at 143-154. The Attorney General withdrew his objection to 47 of the 60 annexations described above. *Id.* at 141. Rome voluntarily supplemented its request for reconsideration on July 14, 1976. *Id.* at 155-159. The Attorney General denied the request for reconsideration on August 12, 1976. *Id.* at 159-162.

[8] Thus, as Mr. Justice Powell has recognized, when the electoral changes and annexations here at issue were enacted "there was no reason to suspect that § 5 preclearance was required." Berry v. Doles, 438 U.S. 190, 197 n.1 (1978) (POWELL, J., concurring). Compare Justice Powell's understanding with that of the court below. Juris. State. at 28b n.65, 53b. See also p. 84 n.75, *infra.*

Appellants filed this action on May 9, 1977,[9] seeking a declaratory judgment, pursuant to Sections 4, 5, and 14 of the Act, that: (1) the prohibitions of Section 5 of the Act are constitutionally limited to purposeful discrimination; (2) Section 5 violates Article IV, Section 4, and the First, Fifth, Ninth, and Tenth Amendments to the Constitution; (3) the Attorney General unconstitutionally applied Section 5 to the City of Rome; (4) the City of Rome is entitled to bailout[10] from the coverage of the Act pursuant to Section 4, because it has not used any test or device during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color; (5) the challenged electoral changes and annexations were precleared by the Attorney General; (6) the challenged electoral changes and annexations did not have the purpose and would not have the effect of denying or abridging the right to vote on account of

[9] Prior to the ruling of the Court in Morris v. Gressette, 432 U.S. 491 (1977), Appellants instituted an action against the Attorney General in the United States District Court for the Northern District of Georgia pursuant to the Mandamus and Venue Act of 1962, 28 U.S.C. § 1362 (1970). That case was dismissed February 24, 1977. City of Rome v. Bell, No. C-76-159-C (N.D. Ga. Feb. 24, 1977).

[10] Appellants will use, throughout this brief, the well-known terms "bailout," to refer to the exemption procedure of Section 4 of the Act, and "preclearance," to refer to the approval procedures of Section 5.

race or color; and (7) Appellants were entitled to an award of attorneys fees. App. at 13-38.

On February 22, 1978, the court below dismissed Count V of Appellants' complaint, which contended that the Attorney General unconstitutionally applied Section 5 of the Act to Rome. Juris. State. at 13a-15a. On April 4, 1979, in an order which was followed on April 9, 1979, by an as yet unreported opinion, the Court denied Appellants' motion for summary judgment, granted that of Appellees on Counts I, II, III, IV, and VI of Appellants' complaint, and dismissed Appellants' case. *Id.* at 1b-2b.[11] No ruling was made on Count VII, the prayer for attorneys fees. *Id.* The court below did approve, without objection from the Appellees, the transfer of voter registration responsibilities from Rome to Floyd County. *Id.*

The refusal of the court below to approve the electoral changes and annexations was grounded upon a prediction that the electoral changes would decrease the probability that a black would be elected to public office in Rome and that the annexations would probably reduce black electoral strength. *Id.* at 49b-51b. The court considered it significant that "there has never been a black elected to political office in the City of Rome," Juris. State. at 8b, and, though acknowledging that a statistical demonstration of racial bloc voting is impossible in this case, *id.* at 10b, held that there is other evidence probative of bloc voting and "presume[d]" that it would continue. *Id.* at 10b-11b, 54b.

[11] Count I of Appellants' complaint charged that Rome was not a jurisdiction subject to Section 5. Appellants concede that this issue was decided adversely to them by this Court in United States v. Board of Commissioners, 435 U.S. 110 (1978).

VI. Summary.

The refusal of the District Court to approve Rome's electoral changes and annexations brings now to this Court the question of what is the impact of the Act and the Constitution upon a political subdivision which is found to be innocent of any discriminatory purpose or, put more generally, is a racial quota of electoral success required by the Act and is such a quota permitted by the Constitution?

SUMMARY OF ARGUMENT

I.

Appellants assert that the electoral changes and annexations at issue must be precleared because such electoral changes and annexations, found to have been enacted without any racially discriminatory purpose, are not prohibited by Section 5 of the Act. A proper construction of Section 5, designed to remain within constitutional limits, indicates that electoral changes and annexations should be found effective when the trier of fact determines that no racially discriminatory purpose motivated their enactment. A judicial determination of innocent purpose is alone sufficient, under the terms of Section 5, to mandate approval. The initial inquiry should be whether or not "purpose" exists. If "purpose" is found not to exist, as in the present case, then the examination must end. If "purpose" is found to exist, then "effect" must be examined to determine whether or not a violation of the Act has occurred. If it is unclear whether or not "purpose" exists, then "effect" should be examined to determine whether it calls for an inference of "purpose."

Appellants further submit that Section 5 does not contemplate the use of "irrebuttable presumptions" of

the existence of "purpose" from a judicial finding of "effect." Appellants maintain that the use of "irrebuttable presumptions" from "effect" have not been sanctioned by this Court when the protection of fundamental rights is in question. Such presumptions are inherently improper and their use by the District Court has effectively inserted a racial quota of political success into the Section 5 standard of "purpose and effect."

The District Court's finding of "effect" as the basis of an "irrebuttable presumption" was premised upon evidence insufficient as a matter of law and was developed from an erroneous determination of the existence of racial bloc voting in Rome. The evidence with respect to the existence of racial bloc voting in Rome is legally insufficient to serve as the basis for the finding of an "effect" proscribed by Section 5 of the Act.

II.

Appellant City of Rome asserts that it should be exempt from the provisions of Section 5, because it established to the satisfaction of the court below that no literacy test or other device has been employed in Rome as a prerequisite to voter registration during at least the past seventeen years. Rome, thus, met the factual test established by the bailout mechanism of Section 4(a) of the Act. Rome argues that municipalities located in States covered by the Act can independently bailout from this coverage. This ability to bailout derives from the language of the Act, especially as construed by this Court in *United States* v. *Board of Commissioners*, 435 U.S. 110 (1978), which established the geographical reach of Sections 4 and 5. The construction of Section 4 advanced by Appellant City of Rome is especially appropriate when a local government has been found innocent of racial discrimination in voting.

III.

If the Appellants' construction of Section 5 is not accepted, and the Act is determined to proscribe electoral changes and annexations enacted without any racially discriminatory purpose, then Congress has acted beyond its delegated powers. For this reason, Section 5 of the Act is unconstitutional.

The opinions of this Court in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), and *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), and the recent decisions construing the enforcement provision of the Fourteenth Amendment, *Washington* v. *Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *Personnel Administrator* v. *Feeney*, 47 U.S.L.W. 4650 (U.S. June 5, 1975) (No. 78-233), and *Columbus Board of Education* v. *Penick*, 47 U.S.L.W. 4924 (U.S. July 2, 1979) (No. 78-610), indicate that an intentional act is required in order to violate the Fifteenth Amendment. Appellants subscribe to the holding of the United States Court of Appeals for the Fifth Circuit in the consolidated cases of *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir.), *pet. for cert. filed*, 47 U.S.L.W. 3283 (U.S. Oct. 24, 1978) (No. 78-492), *Bolden* v. *City of Mobile*, 571 F.2d 238 (5th Cir.), *prob. juris. noted*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978) (No. 77-1844), *Blacks United for Lasting Leadership, Inc.* v. *City of Shreveport*, 571 F.2d 248 (5th Cir. 1978), and *Thomasville Branch of NAACP* v. *Thomas County*, 571 F.2d 257 (5th Cir. 1978), that the Amendment is violated only by intentional acts.

Historical analysis of the Fifteenth Amendment similarly indicates that an intentional act is required in order to violate its terms. Congress did not seek to

create a federal right to vote in proposing the Fifteenth Amendment, and, thus, Congress does not have plenary power to prohibit electoral changes or annexations solely on the basis of disproportionate impact.

Section Two of the Fifteenth Amendment, authorizing Congress to enforce the normative terms of Section One of the Amendment, does not provide congressional power to expand those terms and, thus, reach, through Section 5, electoral changes or annexations that are innocent of purposeful racial discrimination. Historical analysis of Section Two indicates that it granted Congress power only to enforce the normative provisions of Section One. This Court's decisions construing legislation enacted pursuant to Section Two during the Reconstruction Era, during the years from 1957 until 1964, and after the Voting Rights Act of 1965, are consistent with this view. Appellants similarly assert that Congress may not through the creation of irrebuttable presumptions of invidious purpose proscribe actions having only a racially disproportionate impact under the "appropriate legislation" authority of Section Two of the Amendment.

IV.

Section 5 unconstitutionally intrudes upon basic concepts of Federalism and rights guaranteed by the First, Fifth, Ninth, and Tenth Amendments of the Constitution. Appellants assert that these constitutional issues can be examined at this time, because the 1965 Act has been viewed by this Court as temporary, emergency legislation, and conditions now prevalent in the covered jurisdictions no longer justify radical remedies that strain the federal structure in the manner of Section 5.

Section 5 is inconsistent with the basic assumptions of our federal system. The constitutional principles of Federalism embodied in Article IV, Section 4 and the Tenth Amendment are violated by Section 5, because it deprives the covered jurisdictions of their ability to function effectively as members of a federal system.

Section 5 infringes upon the constitutional rights of private citizens by stripping them of their rights of political participation. The Attorney General's actions pursuant to Section 5, in the present case, have resulted in the disenfranchisement of the citizens of Rome for over four years, notwithstanding findings by the court below that the matters to which the Attorney General objects were enacted without any racially discriminatory purpose. Such a disenfranchisement is violative of the First, Fifth, Ninth, and Tenth Amendments of the Constitution.

V.

The electoral changes and annexations presently before this Court have actually been precleared. The Attorney General of the United States precleared the Georgia Municipal Election Code of 1968 insofar as it relates to certain of the electoral changes which Rome has sought to make to its Charter. By virtue of the terms of the 1968 Code and the Attorney General's actions with respect to the Code, certain of Rome's changes have been effectively precleared. Appellants also assert that the electoral changes and annexations at issue have become effective by reason of the fact that the Attorney General failed to respond to a request for reconsideration of his objection to Rome's changes within 60 days of that request and thus failed to respond in accordance with his own regulations.

VI.

Appellants urge that Rome be exempted from the Act or that Section 5 of the Act be declared unconstitutional. If Rome is not exempted from the Act and Section 5 of the Act is not struck down, then Rome, and other jurisdictions, which are free of purposeful discrimination and which have never employed tests or devices that violate the Fifteenth Amendment, will continue to suffer the administrative burden of Section 5 with respect to all future annexations and political changes. In the absence of a holding that Rome is exempt from the Act or that Section 5 is unconstitutional, Appellants request partial relief by a declaration that the present political changes and annexations are effective either by reason of the fact that Section 5 of the Act does not prohibit electoral changes and annexations free of discriminatory purpose or by reason of the fact that the Attorney General has given his approval.

ARGUMENT

Rome put voluminous evidence of its constitutional compliance before the trial court, and it has been found innocent; yet it may not function. For the reasons stated herein, the judgments of the United States District Court for the District of Columbia should be reversed, so that democratic government will be restored to Rome.

I. Electoral Changes and Annexations Enacted Without Discriminatory Purpose Are Not Prohibited By Section 5 of the Act.

The State of Georgia has been designated a covered jurisdiction pursuant to Section 4 of the Act, 30 Fed. Reg. 9897 (1965), and its municipalities are required

to comply with Section 5. *United States* v. *Board of Commissioners,* 435 U.S. 110 (1978). The electoral changes and annexations here at issue are "standards, practices or procedures, with respect to voting" that, to be effective, must be precleared under Section 5 of the Act either by the Attorney General of the United States or by the United States District Court for the District of Columbia. Appellants submit that a proper construction of Section 5 indicates that the present electoral changes and annexations should be found effective because the court below determined that racially discriminatory purpose did not motivate their enactment.

Appellants' proposals regarding the construction of the "purpose" language of Section 5 arise from four important determinations made by the court below, all significantly related to the meaning of "purpose" in the statute: (1) the court concluded that the City carried its burden of showing that the electoral changes were not enacted with a discriminatory purpose, Juris. State. at 45b, and the innocence of the annexations was admitted, Juris. State. at 49b, but the court refused preclearance; (2) the court held that Congress "instructed the courts that the existence of racially disproportionate impact raises an irrebuttable presumption of invidious purpose," Juris. State. at 36b; (3) the court in ultimately finding illegality through use of the irrebuttable presumption found a discriminatory effect in the electoral changes because it concluded black candidates would have been successful under the prior system but had failed under the altered system, Juris. State. at 8b; 47b-48b; (4) the court in finding illegality by irrebuttable presumption from effect accepted the concept of bloc voting and then relied on "strands of evidence"

concerning bloc voting that are insufficient as a matter of law, Juris. State. at 13b.

Appellants submit that the determination of innocent purpose is itself sufficient under the statute to establish the right to implement the changes. In order to remain within constitutional limitations, the threshold question must be: Is there "purpose"? If the answer is found to be no, as in the present case, then examination by the court or the Attorney General must end. If "purpose" is found to exist, then "effect" must be examined to determine whether or not a violation of the Act has occurred. If it is unclear whether or not "purpose" exists, then "effect" should be examined to determine if it calls for an inference of "purpose." Such a construction is consistent with a proper view of the reach of the Fifteenth Amendment and the power of Congress under Section Two of the Amendment. Appellants argue at length below [12] and here submit that: (1) Section One of the Fifteenth Amendment prohibits only intentional discrimination; and (2) alhtough Congress may provide specific remedies for constitutional violations, Congress has no power to expand the normative content of the Fifteenth Amendment to prohibit electoral changes solely on the basis of disproportionate racial impact. A construction such as herein proposed is thus plainly within constitutional limits; only purposeful behavior would be proscribed. The legislative history of Section 5 lends at least physical support to this view. The original version of Section 5 (denominated as Section 8) did not contain the term "purpose" in the establishment of the preclearance

[12] *See* pp. 46-68, *infra*.

standard.[13] The ultimate inclusion of this element suggests its independent significance.

Appellants next assert that a construction of the statute which permits, in the same opinion, a determination of innocence and a presumption of guilt must be corrected.[14] The ultimate determination of illegality through the mechanism of the irrebuttable presumption is contrary to the teachings of this Court. The use of irrebuttable presumptions has been disallowed in a wide variety of areas. In *Heiner* v. *Donnan,* 285 U.S. 312 (1932), the Court struck down an act of Congress which stated that gifts made within two years prior to the donor's death were made in contemplation of death. The Court declared that such a presumption "constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to exist in actuality." *Id.* at 329. The Court in *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942), struck down a state statute which permitted the sterilization of certain felons, based upon a presumption that felonious traits were inheritable. In *Stanley* v. *Illinois,* 405 U.S. 645 (1972), the Court invalidated a statutory irrebuttable presumption that unmarried fathers are unfit to raise children. The Court in *Vlandis* v. *Kline,* 412 U.S. 441 (1973), rejected the use of an irrebuttable presumption that denied out-of-state college students the chance

[13] *Hearings on S. 1564 Before the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. 1-4 (1965); *Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 89th Cong., 1st Sess. 1, 863-65 (1965).

[14] The result of this construction is that although a jurisdiction may disprove, as Rome has, the existence of any invidious purpose, such proof is to no avail because Congress has supposedly said that where disproportionate impact exists purpose cannot be disproved.

subsequently to prove their in-state residence. In *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), the Court struck down a local rule presuming irrebuttably that school teachers five-months pregnant were incapable of teaching effectively.[15]

In interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. 2000e-2000e-17 (1974 & Cum. Supp. 1974 to 1978), a statute analogous to the Voting Rights Act of 1965 in that it also involves the exercise of the remedial power of Congress, this Court has held consistently that employment practices which have a disproportionate racial impact merely raise an inference of discriminatory intent which may be rebutted by an employer. *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978). *See, e.g., Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702 (1978); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). *See generally Duren* v. *Missouri*, 99 S. Ct. 664, 670 n.26 (1979); *Castaneda* v. *Partida*, 430 U.S. 482, 497-98 (1977).

Appellants also suggest that a proper application of the "effect" standard of Section 5 indicates that, even with employment of the irrebuttable presumption, the ultimate determination of illegality was improper. To be objectionable, electoral changes must "have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of Section 5." *Beer*

[15] An irrebuttable presumption dealing with non-fundamental or economic rights may sometimes be upheld. *See, e.g.*, Weinberger v. Salfi, 422 U.S. 749 (1975); and Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). *But see* Turner v. Utah Dep't of Employment Security, 423 U.S. 44 (1975).

v. *United States*, 425 U.S. 130, 141 (1976). Appellants note, initially, that calculations based on the District Court's own findings indicate that the annexations did not, in fact, dilute black citizens' political power in Rome. See pp. 12 to 15, *supra*. Hence, from these calculations it follows that "purpose" could not be presumed from the "effect" of the annexations simply because there was no prohibited effect.

The dilution principle with respect to constitutional cases was articulated in *White* v. *Regester*, 412 U.S. 755 (1973) as follows:

> To sustain such claims(that the voting strength of racial groups is being cancelled out or minimized), it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 765-66 (citations omitted).

Although neither the Voting Rights Act, nor cases interpreting it, establish how a jurisdiction may carry its burden of proof under Section 5, Rome deemed the so-called "*Zimmer* standards" to be appropriate in that context. *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976), enumerated the factors which bear on the issue of dilution:

> The Supreme Court has identified a panoply of factors, any number of which may contribute to the

existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, *Whitcomb* v. *Chavis* . . . would require a holding of no dilution. *Whitcomb* would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. Conversely, where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made.

Id. at 1305.

Appellants respectfully submit that the findings of the court below regarding the Rome city government's behavior with respect to its black citizens satisfy the *Zimmer* standards.[16]

[16] The findings of the District Court, as numbered in the Statement of the Case, see pages 6-7, *supra*, may be classified under the *Zimmer* "panoply of factors" as follows:

Access to the political processes:
(1), (2), (3), (4), (10), (11), (12), (13), (14), (15), (16), (17), (18)

Surely the conclusions below that Rome's government is "responsive to the needs of the black community" and that the black community had such political power that it could "determine the outcome of many if not most contests" is a determination of the present existence of a "fair allocation of political power between white and nonwhite voters" as recognized in *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 167 (1977) (BRENNAN, J., concurring).[17] These determinations are not indicative of "a retrogression in the position of racial minorities with respect to their effec-

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Responsiveness of elected officials:
(5), (6), (7), (8), (9), (13), (16), (17)

All eighteen of the findings prove the *absence of past discrimination.*

The *reasons* for the electoral changes are related at pages 8-11, *supra*; the *reasons* for the annexations are related at page 12, *supra*. See App. at 191-192.

[17] Indeed, because "blacks often hold the balance of power in Rome elections," Juris. State. at 55b, it would appear that in Rome black voters have more than "political power." Under the findings of the court below, they would appear to have "voting power," which has been "defined as the ability to cast votes that change election outcomes." L. TRIBE, A TREATISE ON AMERICAN CONSTITUTIONAL LAW 750 (1978) (hereinafter cited as TRIBE). In any event:

> A minority, even in a fair apportionment scheme, would probably lack the power to insure that the policies it favors are adopted by the legislature. It is, after all, a minority. But it would have a *voice* in the formulation of policy, and this voice has value independent of its ability to cast a deciding ballot, first because minority spokesmen might persuade the majority on any given occasion and second, because such spokesmen might alter the long-run character of political thought by the participation in legislative deliberations. Moreover, the situation is vastly oversimplified by assuming that there are cognizable, mutually exclusive, and exhaustive "minorities" and "majorities."

Id. n.2 (emphasis original). *See also Lubin* v. *Panish*, 415 U.S. 709, 716 (1974).

tive exercise of the electoral franchise." *Beer* v. *United States,* 425 U.S. 130, 141 (1976). Thus, these determinations are similarly not indicative of any proscribed "effect" under Section 5.

Nevertheless, in the face of such factual conclusions, the court refused to preclear Rome's changes, apparently because of the conclusion that the changes disadvantaged or discouraged black candidates. See Juris. State. at 8b-9b; 47b-48b.[18] Yet, this Court has held that no minority group has a federal right to elect minority officials "in proportion to its voting potential." *Beer* v. *United States,* 425 U.S. at 136 n.8; *White* v. *Regester* 412 U.S. at 765; *Whitcomb* v. *Chavis,* 403 U.S. at 153. If the decision of the court below receives the imprimatur of this Court, then the concept of political equality for racial and ethnic groups will have been radically redefined. Indeed, the Act will have evolved into a federal guaranty of a right to maximum political effectiveness, or, indeed, a *quota* of political success. The "effect" proscribed by Section 5 will be deemed to

[18] Implicit in the refusal to preclear because of this conclusion is the presumption that white officials represent their race and not the electorate as a whole and cannot represent black citizens; however, this Court has ruled to the contrary in Dallas County v. Reese, 421 U.S. 477 (1975) and Dusch v. Davis, 387 U.S. 112 (1967). *Accord,* Vollin v. Kimbel, 519 F.2d 790, 791 (4th Cir.), *cert. denied,* 423 U.S. 936 (1975).

Under the undisputed record of satisfaction of the *Zimmer* standards in the case *sub judice,* such a presumption is, effectively, irrebuttable. Thus, as we have noted, see p. 27 *infra,* a covered jurisdiction may disprove invidious purpose, as Rome has, but such proof is to no avail because Congress has supposedly said that where disproportionate impact exists purpose *cannot* be disproved; so also, under the ruling below, a covered jurisdiction may meet the *Zimmer* standards and yet be deemed to have enacted changes with discriminatory effect. The burden of proof under Section 5 is thus, in reality, insurmountable, and federal restructuring of local government is inevitable.

be the disproportionate result of political processes, rather than disproportionate access to those processes.

Two members of this Court have very recently observed "whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another." *United Steelworkers* v. *Weber,* 47 U.S.L.W. 4851, 4867 (U.S. June 27, 1979) (Nos. 78-432, 78-435, 78-436) (BURGER, C.J. and REHNQUIST, J., dissenting). Racial quotas are less justifiable in the political context than in any other aspect of society. It has been observed that none of the reasons customarily given for the use of racial and ethnic quotas in education apply to the realm of voting:

> Can quotas be justified as part of an effort to create artificially that mix which would have evolved naturally under more auspicious circumstances? In the schools, perhaps, but not in government. Political offices are not equivalent to seats in a classroom. Groups in our society have never been politically represented in proportion to their size. The Irish have been 'overrepresented,' Jews were long 'underrepresented.' Culture and experience—not simply discrimination—have accounted for such differences. Nor does proportional racial representation in voting have anything in common with admissions to desirable educational programs. There is no barrier set to voting, as there is by selective admissions. And one vote has the same value as any other.

Thernstrom, *The odd evolution of the Voting Rights Act,* THE PUBLIC INTEREST 49, 61-62 (Spring 1979) (hereinafter cited as *Thernstrom*).

A quota of racial political success in Rome would tend strongly to stigmatize black persons, to compart-

mentalize the electorate, to reinforce any arguable bloc voting syndrome, and to prevent minority members from exercising influence on the political system beyond the bounds of their quota.[19] Members of the black community in Rome would not be able to "determine the outcome of many if not most contests," but, instead, would remain forever a minority in their representative influence. In Rome, and similar jurisdictions, there would be "no device more destructive to the notion of equality than the *numerous clausus*—the quota." *United Steelworkers* v. *Weber*, 47 U.S.L.W. at 4867 (BURGER, C.J., and REHNQUIST, J., dissenting).

Finally, Appellants submit that in finding illegality by irrebuttable presumption from effect, the District Court erroneously accepted the concept of bloc voting and relied on insufficient evidence.

Appellants generally object to the District Court's apparent acceptance of the "[t]he notion that Americans vote in firm blocs [which notion] has been repudiated in the election of minority members as mayors and legislators in numerous American cities and districts overwhelmingly white." *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 187 (1977) (BURGER, C.J. dissenting).[20] Rome, and other jurisdictions have de-

[19] While the decision of the court below may have been perceived as an "effort to achieve proportional representation . . . aimed at aiding a group's participation in the political processes," United Jewish Organizations v. Carey, 430 U.S. 144, 172 (1977) (BRENNAN, J., concurring), in reality it may very well frustrate the group's "potentially successful efforts at coalition building across racial lines." *Id* at 172-73.

[20] Indeed, an asserted singular incidence of racial bloc voting has been elevated into *polarized* voting, and the continuance of such voting is presumed. *Compare* Juris. State. at 13b *with* p. 54b.

Courts' repeated emphasis on racial bloc voting tends "to preserve traditional assumptions about groups rather than thoughtful

nied the existence of racial bloc voting and sought to prove its absence. *See Charlton County Board of Education* v. *United States*, 459 F. Supp. 530 (D.D.C. 1978). See App. at 217-232.

The court below noted that a statistical demonstration of the existence *vel non* of racial bloc voting in Rome was impossible. In finding its existence, the court relied upon three "strands of evidence." Juris. State. at 13b. First, while recognizing that the opinion testimony of black witnesses and white witnesses differed regarding the issue of racial bloc voting, the court dismissed the testimony of white witnesses as that of "interested witnesses," Juris. State. at 12b, relying upon an isolated quotation from *City of Richmond* v. *United States*, 422 U.S. 358, 377 (1975), and

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scrutiny of individuals." Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 709 (1978). The entire preoccupation with the concept of racial bloc voting, whether in its hypothesis, proof, remedying, or reinforcement, seems to go wide of the mark in the context of the right sought to be protected. When this Court entered the "political thicket," its decisions focused upon individual voter weight. "The rights allegedly impaired are individual and personal in nature." Reynolds v. Sims, 377 U.S. 533, 561 (1964). See also South v. Peters, 339 U.S. 276, 280 (1950) (DOUGLAS, J., dissenting). Protection of the individual vote appears to have been the goal of the Voting Rights Act when it was enacted. Now the focus has seemingly faded to group power, away from individual rights. Language in *Bakke* suggests that this original understanding should receive renewed attention:

> Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice the principle of *individual* equality, without regard to race or religion, was one on which there could be a "meeting of the minds" among all races and a common national purpose.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 416 n.19 (1978) (STEVENS, J., concurring in part and dissenting in part) (emphasis original).

discounting important *dicta* which resulted in remand of those proceedings. *Id.*

Second, the court relied upon the unsuccessful campaign for the Board of Education in 1970 by Reverend Clyde Hill, a black candidate, although the court conceded that "Reverend Hill did receive a sizable number of white votes." Juris. State. at 12b. Reverend Hill received 45% of the votes cast in the run-off election, although the relative proportion of black voters was much lower. Juris. State. at 12b. Appellants contend that the Hill campaign not only does not support a finding of racial bloc voting, but, indeed, negates it.

Third, the court related the testimony of Dr. James W. Loewen, a political sociologist, who testified as an expert witness that racial bloc voting existed in Floyd County (not the City of Rome) during the 1968 Democratic United States Senate Primary between Herman Talmadge and Maynard Jackson. This testimony was expressly relied upon notwithstanding the facts that: (1) the expert was uncertain of the identity of the incumbent in the Talmadge-Jackson election, although he admitted incumbency was an important consideration; (2) Senator Talmadge had served as a Senator for 12 years at the time of the 1968 election, and Mr. Jackson, now the Mayor of Atlanta, was making his first bid for public office; and (3) the testimony concerned an election for national office that occurred 10 years prior to the decision of the court below. Moreover, Dr. Loewen summarized his opinion with the statement, "I cannot state with certainty that Rome, Georgia, in every election since 1968 or from 1978 through 1988 will racially bloc vote." [21] See App. at 228.

[21] There was no evidence that voting along racial lines "regularly happens" in Rome, United Jewish Organizations, 430 U.S. at 166, nor that any group was "fenced out of the political process and their voting strength invidiously minimized," Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

Appellants strenuously objected to the testimony of Dr. Leowen, see App. at 224-228; nevertheless, the court relied upon it to support an inference of racial bloc voting in Rome as of 1978. Juris. State. at 12b-13b.

One commentator has observed that "consistent and persistent racial bloc voting" can disadvantage a political minority but:

> In situations which are politically fluid, disadvantaged voters are not considered disenfranchised. Democrats in a Republican community, for example, are free to join the Republican Party and bore from within. Candidates can choose to emphasize certain issues at the expense of others in an effort to win votes. But in a situation of *true racial bloc voting,* there is no vying for votes across racial lines. Between two candidates of different races, there is no contest at all. Campaigning is unnecessary; a racial count will do. Color becomes the sole determinant of political effectiveness.
>
> Such a situation must be distinguished from one in which black, white, and other citizens belong to political interest groups that cross racial lines.

Thernstrom, supra at 57-58 (emphasis added).

The evidence relied upon by the court below is tenuous at best, and the political situation in Rome hardly approaches the racial cleavage in elections that is deemed to constitute "true racial bloc voting." See Note, United Jewish Organizations v. Carey *and the Need to Recognize Aggregate Voting Rights,* 87 YALE L.J., 571, 599 n.148 (1978). *See generally* App. at 217-228.

In summary, Appellants submit that a proper construction of Section 5 indicates that the electoral changes and annexations before the Court should be found effective because no racially discriminatory purpose motivated their enactment. A judicial determination of innocent purpose is alone sufficient under Section 5 to mandate approval. Furthermore, Appellants submit that the statute does not contemplate the use of an irrebuttable presumption of illegality from effect to contravene a judicial determination of innocent purpose. Also, in reaching illegality by irrebuttable presumption from effect, the District Court erroneously imported a racial quota of success into the meaning of Section 5. Finally, the court below erroneously accepted the concept of bloc voting and relied on insufficient evidence of bloc voting in reaching illegality by irrebuttable presumption from effect.

II. Municipalities Located In States Covered By the Provisions of the Act Can Independently Bailout From the Coverage of the Act.

Section 4 of the Act provides a mechanism for exemption from its prohibitions. This bailout provision has been recognized as an amelioration of the severity of the Section 5 preclearance requirement, *Briscoe* v. *Bell,* 432 U.S. 404 (1978), and, thus, a necessity to the constitutional underpinnings of the Act. *See South Carolina* v. *Katzenbach,* 383 U.S. 301, 331 (1966); Juris. State. at 44b.

The District Court established the factual predicate for bailout by the City of Rome.

> [W]e find that no literacy test or other device has been employed in Rome as a prerequisite to voter registration during the past seventeen years.

Juris. State. at 5b. The court summarized the evidence supporting this finding: "While registrants were technically required to pass the state literacy or character tests, the affidavits of the City officials responsible for voter registration, supported by the unanimous testimony of black deponents, are to the effect that such tests have never been applied discriminatorily and have not been administered at all in recent years." *Id.* at 5b-6b.

The question presented for decision by this Court is whether Rome, having made this factual showing, may bailout, independently of Georgia. Judge McGowan observed that this is apparently a question of first impression and conceded the "abstract force," *id.* at 20b, of Appellants' position. Yet, the court below refused to use "logic as a means of subverting congressional intent," *id.*, and rejected "any logical inference supporting Appellants' position, that might be drawn," *id.* at 23b, from this Court's decision in *Sheffield,* 435 U.S. 110 (1978).

Under Section 4(a), a bailout action may be brought by a "State or subdivision" that is "such" as those to which reference is made earlier in Section 4(a).[22] This reference designates the parties who may properly bring a bailout action.

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[22] Section 4(a) provides:

> To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, . . . no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United

When the words to which reference is made are analyzed, it can be seen that proper parties might include either: (1) a subdivision of a State "with respect to which the determinations have been made under the first two sentences of subsection (b) of this section;" or (2) might only include a "political subdivision with respect to which such determinations have been made as a separate unit . . . ."

There are at least five indications that the first construction is the one established by the language of the Act. First, the reference to a "subdivision" as a bailout plaintiff does not indicate that it must be a "political" subdivision of the type as to which separate determinations of coverage may be made. Second, the general reference to a "State or subdivision" could reasonably refer to subdivisions *within* a covered State because the remedial language of 4(a) geographically reaches elections "*in*" a covered State. Third, those "subdivisions" which may be bailout plaintiffs could reasonably include both separately designated "political subdivisions" and "subdivisions" of covered states. Fourth, the definition of those States covered under 4(a) is provided by 4(b),[23] which applies the remedies

States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color . . . .

42 U.S.C.A. § 1973b(a) (Cum. Supp. 1974 to 1978).

[23] Section 4(b) provides:

[Sentence One] The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that

of 4(a) "*in* any State or *in any* political subdivision of a State" (emphasis added) in which certain conditions are found to exist. Again, the language of 4(b) is geographical in reach and, thus, might reasonably include "subdivisions" within covered States.

Strong support for the construction advanced by the Appellants is also provided by a fifth matter, the fact that section 5,[24] the preclearance provision, denomi-

less than 50 per centum of such persons voted in the presidential election of November 1964. [Sentence Two] On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. [Sentence Three] On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

42 U.S.C.A. § 1973b(b) (Cum. Supp. 1974 to 1978).

[24] Section 5 provides:

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first [second or third] sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on

nates a proper preclearance plaintiff as a "State or subdivision" that is "such" as those described in 4(b). It is now clear, by virtue of *Sheffield,* that subdivisions within a covered State must institute preclearance actions, and it has never been suggested that subdivisions within covered States may not institute such actions by reason of the fact that such subdivisions have not been separately designated. Therefore, if a subdivision, such as Rome, located in a covered State must institute preclearance because it is a governmental unit described in Section 4(b), it must be concluded, as a matter of logic, that such a subdivision is a governmental unit that may bailout, because Section 4(b) also determines what governmental units are proper bailout plaintiffs.

This Court's decision in *Sheffield* lends support to Appellants' position. This opinion establishes the interrelationship of Sections 4 and 5 and the geographical reach of each section.

It appears that the *Sheffield* opinion is developed, in part, from the comment of Mr. Justice Harlan, concurring in part and dissenting in part, in *Allen* v. *State Board of Elections,* 393 U.S. 544, 584 (1969), in which he stated that Section 5 "is clearly designed to march in lock step with Section 4—the two sections cannot be understood apart from one another."

November 1, 1964 [1968 or 1972], . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . .

42 U.S.C.A. § 1973c (Cum. Supp. 1974 to 1978).

The Court's exhaustive textual and historical analysis in *Sheffield* did not distinguish the internal aspects of Section 4, the suspension of tests and the bailout remedy. In fact, it was stated in the context of refuting the District Court's position as to the scope of Section 5, that Section 4(a) clearly applies to all political units in covered jurisdictions. 435 U.S. at 127 n.14. Mr. Justice Powell concurred in part in *Sheffield* and observed that Section 5 treats "the governmental units within a designated state or political subdivision as equivalent of the state or political subdivision." *Id.* at 983.

In what appears to be the most direct statement of the Court's position, it was held:

> [I]t is clear that once a State is designated for coverage the Act's remedial provisions apply to acts that are not formally those of the State. Section 4(a) of course applies to all state actors and even the legislative history relied upon by the District Court reveals the congressional understanding that the reference to State in § 5 includes political units within it. This alone would appear sufficient reason to make § 5's preclearance requirement apply to all state action. So in view of the explicit textual relationship between § 4 and § 5, the irrelevance of § 14(c) (2) . . . and the critical role that § 5 is to play in securing the promise of § 4(a), it is wholly logical to interpret "State . . . with respect to which" § 4(a) is in effect as referring to all political units within it.

Id. at 977.

The Court's opinion in *Sheffield* twice refers to the "textual interrelationship between Section 4(a) and Section 5." *Id.* at 126, 128. The opinion dismisses the slight linguistic differences between Sections 4 and 5 and determines that "the actual terms of Section 5

suggest that its coverage is to be coterminous with Section 4(a)'s." *Id.* at 126. Rome submits that the coverage terms of Section 4(a) are coterminous with those of Section 5.

The *Sheffield* opinion does not mention what might be called the "bailout" sentence of Section 4(a) specifically, but the Court's exhaustive treatment of the statutory scheme compels the conclusion that if any such difference in treatment could rightfully be developed, it would have been set forth. This is especially true in light of the fact that the United States made the Court aware of this position in its *Sheffield* brief.[25]

The District Court summarized Appellants' position with respect to bailout:

> The court in *Sheffield* interpreted Section 4(a)'s prohibition of tests and devices "in any State" to import a geographical reach. It then inferred that in light of the close connection between sections 4 and 5, the "State[s]" required to seek judicial or administrative preclearance for voting changes under Section 5 included not only covered States themselves, but also all subsidiary political units within the borders. By like reasoning, it would seem that the "State[s]" entitled to bring Section 4(a) bailout actions should also include political subunits within covered states. Hence, it could be argued, Rome, considered as a "state," should be entitled to its bailout action here.

Juris. State. at 20b. The court acknowledged, in this regard, the "abstract force of this argument," but a contrary intent of Congress was said to be "crystal clear." *Id.* at 20b.

[25] Brief for the United States at 25, United States v. Board of Commissioners, 435 U.S. 110 (1978).

Whatever the clarity of the legislative intent, Appellants submit that given the language of the Act, the opinion of this Court in *Sheffield*, and the constitutional considerations, no other possible interpretation can be given to the availability of the bailout remedy. So long as *Sheffield* is the law, and political subunits within covered states must submit all changes and annexations for preclearance, then such political subunits must be allowed to bailout by virtue of the common reference in the preclearance section and the bailout section to Section 4(b). This Court has made the language of the statute "crystal clear,"[26] and thus the legislative history of the statute must or should be ignored.

[26] The language of Section 4(a), when construed *in pari materia* with Sections 4(b) and 5 and when construed in light of *Sheffield*, is plain. In such a circumstance, it is inappropriate to resort to legislative history. *See* United States v. Rutherford, 47 U.S.L.W. 4724, 4726 (U.S. June 18, 1979) (No. 78-605); Andrus v. Sierra Club, 47 U.S.L.W. 4676, 4678-79 (U.S. June 11, 1979) (No. 78-625); TVA v. Hill, 437 U.S. 153, 184 n. 29 (1978); Ex parte Collett, 337 U.S. 55, 61 (1949); Caminetti v. United States, 242 U.S. 470, 490 (1917); MacKenzie v. Hare, 239 U.S. 299, 307-08 (1915); United States v. First Nat'l Bank, 234 U.S. 245, 259-260 (1914); Bate Refrigerating Co. v. Sulzberger, 157 U.S. 1, 37-42 (1895). The "meaning" of "such State or subdivision" in Section 4(a) is clear by reason of the common understanding of the words used in sections 4(b) and 5 and the interpretation given to the entire Act by the Court in *Sheffield*.

Mr. Justice Frankfurter's view of the use of legislative history supports Appellants' position.

> You may have observed that I have not . . . used the word "intention." All these years I have avoided speaking of the "legislative intent" and I shall continue to be on my guard against using it. The objection to "intention" was indicated in a letter by Mr. Justice Holmes which the recipient kindly put at my disposal:
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> "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean. Of course the phrase often is used to

III. Congress Is Not Empowered Under Section Two of the Fifteenth Amendment of the Constitution to Prohibit Electoral Changes and Annexations Found to be Enacted Without Discriminatory Purpose.

Rome argued to the District Court that Section 5 of the Act is unconstitutional to the extent that Congress has sought to prohibit electoral changes and annexations found to be enacted without discriminatory purpose. The court, however, concluded that "Congress can be said to have instructed the courts that the existence of racially disproportionate impact raises an irrebuttable presumption of invidious purpose."[27] Juris. State. at 36b. Presumably, this conclusion is premised

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express a conviction not exactly thought out—that you construe a particular clause or expression by considering the whole instrument and any dominant purposes that it may express. In fact intention is a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary."

If that is what the term means, it is better to use a less beclouding characterization. Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government . . . .

Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 538 (1947). *See* Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863, 870-872 (1930). *See generally* H. HART & A. SACKS, THE LEGAL PROCESS 1147-48, 1220 (Tent. ed. 1958).

[27] Although Judge McGowan noted that "[i]n light of this disposition, we need not inquire whether, still assuming that the Fifteenth Amendment of its own force reaches purpose only, Congress has the power under Katzenbach v. Morgan, 384 U.S. 641 (1966), to extend the substantive content of the Fifteenth Amendment protections so as to proscribe voting discrimination in effect as well as purpose," Juris. State. at 37b n.74, the inescapable effect of the Court's decision is to acknowledge such a power in Congress. Judge McGowan also noted that "Rome's argument is . . . squarely presented for decision on the facts of this case." *Id.* at 32b n.69.

upon either of two constitutional theories: (1) Section One of the Amendment prohibits electoral changes found to be free of discriminatory purpose but which may have a racially disproportionate impact; or (2) the creation of an irrebuttable presumption of invidious purpose from the existence of racially disproportionate impact is "appropriate legislation" to remedy intentional discrimination pursuant to Section Two of the Amendment. Appellants submit that both of these theories are erroneous.

A. Section One of the Fifteenth Amendment does not confer a federally created right to vote but prohibits intentional discrimination.

This Court has indicated that "purpose" is a *sine qua non* of a Fifteenth Amendment violation. In *Gomillion* v. *Lightfoot,* 364 U.S. 339, 346 (1960), Mr. Justice Frankfurter noted for the Court: "When a legislature thus *singles out* a readily isolated segment of a racial minority for *special discriminatory treatment,* it violates the Fifteenth Amendment." (emphasis added) *See City of Richmond* v. *United States,* 422 U.S. 358, 378 (1975). In *Wright* v. *Rockefeller,* 376 U.S. 52 (1964), the Court upheld a New York congressional apportionment statute, under the Fourteenth and Fifteenth Amendments, because the complaining parties failed to prove that the legislature was *motivated* by racial considerations or that it, in fact, drew the congressional apportionment along racial lines. Mr. Justice Black, writing for the Court, noted that the District Court's findings that "the challenged part of the New York Act was [not] the product of a state *contrivance to segregate* on the basis of race or place of origin . . . was crucial to appellants' case as they presented it, and for that reason their challenge [could not] be

sustained." *Id.* at 58 (emphasis added). The italicized language of these opinions indicates that this Court has found intent to be an element of a Fifteenth Amendment violation.

This Court has directly held that intent is required to prove Fourteenth Amendment violations. In *Washington* v. *Davis*, 426 U.S. 229 (1976), a job-related employment test that resulted in a racially disproportionate impact was upheld because there had been no showing that racial discrimination entered into the establishment or formulation of the test. The Court stated that "we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." *Id.* at 242. Similarly, in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court upheld a zoning board decision that tended to perpetuate racially segregated housing patterns since, apart from its effect, the board's decision was shown to be nothing more than an application of constitutionally neutral zoning policies. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265.

This Court recently reaffirmed these decisions. In *Personnel Administrator* v. *Feeney*, 47 U.S.L.W. 4650 (U.S. June 5, 1979) (No. 78-233), the Court found no equal protection violation in a Massachusetts statute which granted an absolute lifetime preference to veterans, even though the statute had a disproportionate impact upon females. The Court held that " 'discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker, . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 4656. Finally, in *Columbus Board of Education* v. *Penick*, 47 U.S.L.W. 4924 (U.S. July 2, 1979) (No. 78-610), this Court reviewed a decision which enjoined the Columbus, Ohio, Board of Education from continuing to discriminate on the basis of race in operating public schools and ordered the submission of a system-wide desegregation plan. The Court held that "to prevail the plaintiffs were required to 'prove not only that segregated schooling exists but also that it was brought about or maintained by *intentional* state action,' . . . that is, that the school officials had '*intended to segregate.*' " *Id.* at 4927-28 (citations omitted and emphasis added). The lower court decisions in *Penick* were approved because they "recognized that under those cases [*Washington* v. *Davis* and *Arlington Heights*] disparate impact and foreseeable consequences, without more, do not establish a constitutional violation." *Id.* at 4928.

The United States Court of Appeals for the Fifth Circuit, in a comprehensive opinion, encompassing four separate cases, including *Bolden* v. *City of Mobile*, 571 F.2d 238 (5th Cir.), *prob. juris. noted*, 47 U.S.L.W. 3221 (U.S. Oct. 3, 1978) (No. 77-1844), *Blacks United for Lasting Leadership, Inc.* v. *City of Shreveport*, 571 F.2d 248 (5th Cir. 1978), *Thomasville Branch of NAACP* v. *Thomas County*, 571 F.2d 257 (5th Cir. 1978), and most significantly *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir.), *pet. for cert. filed*, 47 U.S.L.W. 3283 (U.S. Oct. 24, 1978) (No. 78-492), recently held that "[a] showing of improper motivation or purpose is necessary to establish a valid cause of action under the fifteenth amendment." *Id.* at 221. *Nevett* was an action

brought by black residents of Fairfield, Alabama, who alleged that an at-large system of selecting the city council president and city councilmen diluted black voting strength. The Fifth Circuit found that "intentional discrimination" must be alleged in a dilution case under both the Fourteenth and the Fifteenth Amendments. *Id.* at 215. Observing that the Fifteenth Amendment has been "invoked successfully only in cases founded on acts of intentional racial discrimination," *id.* at 220, the *Nevett* court determined that this Court's decisions in *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), and *Wright* v. *Rockefeller,* 376 U.S. 52 (1964), require a showing of intentional discrimination in racially based voting dilution claims founded on the Fifteenth Amendment. *Id.* at 220-221.

The history of the Fifteenth Amendment also reveals that Congress sought to prohibit intentional denials of the franchise. Senator Hamilton of Maryland stated in a debate regarding the Enforcement Act of 1870 [28] that:

> Under the fifteenth amendment there must be two intents, or one act with an intent: First, when you come to indict a person under this amendment for violating its provisions you must allege that he refused to register, if that was a prerequisite before he could vote, or that he refused the party his right to vote; and secondly, you must allege that he did so refuse *because of* the party's color, or of his race, or his previous condition of servitude . . . . Under the Fifteenth Amendment the only case that can come within the jurisdiction of the United States is when the right to vote is refused to a man *by reason of* his color, *by reason of* his race, or *by reason of* his previous condition of servitude.

[28] Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870), *as amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871) (current versions at 42 U.S.C. §§ 1981, 1983 (1970).

> Gentlemen may say that it would be extremely difficult *to prove such an intent* in cases of this kind. This may be so, but yet *you must prove it* to the satisfaction of the court and jury . . . .

CONG. GLOBE, 41st Cong., 2d Sess., 357 (1870) (emphasis added).

Congress rejected a proposal that would give it unlimited discretion to abolish state electoral provisions:

> Congress shall have the power to abolish or modify any restrictions upon the right to vote or hold office prescribed by the constitution or laws of any State.

SENATE JOURNAL, 40th Cong., 3d Sess. 226 (1869). Congress therefore appears to have perceived limitations on its power to abolish state electoral provisions. Rome submits that the limit is intentional discrimination.[29]

[29] Certain members of Congress initially favored a proposal that would add additional grounds of prohibition which, while racially neutral on their face, would have a disproportionate impact upon non-whites, because they thought that such disproportionate impacts would otherwise be constitutional: "No discrimination shall be made in any state among the citizens of the United States in the exercise of the elective franchise on account of race, color, nativity, property, education, or creed." SENATE JOURNAL, 40th Cong., 3d Sess. 227 (1869). This proposal was rejected, but the legislators did include the phrase "previous condition of servitude" in the Fifteenth Amendment, because they thought that, absent such a reference, States would be free to disenfranchise persons on that basis even though such a provision would have a disproportionate racial impact. CONG. GLOBE, 40th Cong., 3d Sess. 1225 (1869). Indeed, it was generally believed that if a state passed disenfranchising legislation not based on any of the three specified grounds, it would be valid under the Fifteenth Amendment regardless of its disproportionate impact. *Id.* at 722, 862, 900, 1307, App. 98 (Remarks of Senators Warner of Alabama and Fowler of Tennessee, and Representatives Bingham and Shellabarger of Ohio and Williams of Oregon). Even those who believed

Appellants also argue that in rejecting several proposals which would have conferred a federally created right to vote and a corresponding plenary enforcement power, Congress demonstrated that intent is required for a violation of the Fifteenth Amendment. There is

> [a] difference between legislation by Congress to execute an express power exclusive in itself, and legislation to enforce a limitation of a general power exclusive in the state. In the former case, Congress may claim a liberal construction in aid of its express exclusive power. In the latter case, the state has a right to restrict Congress to the *very terms of the prohibition.* This is especially true when the prohibition affects the power of the state over a subject such as suffrage.

CONG. GLOBE, 41st Cong., 2d Sess., App. 473 (1870) (Remarks of Senator Casserly of California) (emphasis added). The fact of the defeat of the following proposal is consistent with this view:

> All the male citizens of the United States, residents of the several States now or hereafter comprehended in the Union, of the age of twenty-one years and upward, *shall be entitled to an equal vote in all elections in the state wherein they reside,* the period of such residence as a qualification for voting to be decided by each State, except such citizens as shall engage in rebellion or insurrection or shall be duly convicted of treason or other infamous crime.

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that the amendment was not limited to the specified grounds of prohibition believed that it reached "anything growing out of that person's condition of servitude . . . ." *Id.* at 1317 (Remarks of Senator Stewart of Nevada).

SENATE JOURNAL, 40th Cong., 3d Sess. 226 (1869) (emphasis added). Similarly, Congress rejected the following federal enfranchisement proposal:

> Citizens of the United States of African descent shall have the same right to vote and hold office as other citizens.

CONG. GLOBE, 40th Cong., 3d Sess. 1032 (1869). In rejecting these proposals, which would have conferred a federally created right to vote, Congress precluded itself from exercising plenary power to protect the franchise and limited itself to providing remedies for intentional denials of the right to vote.[30]

The opinions of this Court and the history of the Amendment demonstrate that intent is an element of a Fifteenth Amendment violation. Moreover, since Congress did not propose a federally created right to vote in the Fifteenth Amendment, Congress does not have plenary power to prohibit electoral changes or annexations solely on the basis of disproportionate impact.

B. Congress has no power to expand the normative content of Section One of the Fifteenth Amendment to prohibit electoral changes or annexations solely on the basis of disproportionate racial impact.

Section Two of the Fifteenth Amendment provides that "Congress shall have power to enforce this article

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[30] The conclusion that there is no congressional power affirmatively to enforce the franchise, regardless of the purpose of the electoral provision, is also supported by the fact that no minority group has a federal right to elect minority officials in proportion to its voting potential. United Jewish Organizations v. Carey, 430 U.S. 144, 166 (1977); Beer v. United States, 425 U.S. 130, 136 n.8 (1976); White v. Regester, 412 U.S. 755, 765-66 (1973); and Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).

by appropriate legislation." The history of the Amendment and the decisions of this Court demonstrate that Section Two does not empower Congress to expand the normative content of Section One and thereby prohibit electoral changes solely on the basis of disproportionate racial impact.

During the debates on Section Two of the Amendment, certain members of Congress asserted that the provision conferred upon Congress no power of affirmative legislation. CONG. GLOBE, 41st Cong., 2d Sess., App. 353 (1870) (Remarks of Senator Hamilton of Maryland). Others thought that the enforcement provision would consist in merely declaring what acts should be considered void for conflict with Section One and in providing judicial machinery by which cases involving the Amendment might be instituted in the federal courts. *Id.* at 3663 (Remarks of Senator Thurman of Ohio); *id.*, App. 472 (Remarks of Senator Casserly of California); *id.*, 42d Cong., 1st Sess. 648 (1871) (Remarks of Senator Davis of Kentucky). Some congressmen asserted that Congress could not exercise its power under Section Two until the Amendment was violated. *Id.*, 41st Cong., 3d Sess. 1635 (1871) (Remarks of Senator Vickers of Maryland). Notwithstanding these varying interpretations of the provision, the prevailing view was that Section Two gave Congress no more power than it would have without the provision, either because it was a mere repetition of the power granted in the "sweeping clause" of the Constitution, *id.*, 41st Cong., 2d Sess. 3663 (Remarks of Senator Thurman of Ohio), or because the general government is necessarily invested with power to correct infractions of the substantive provisions of the Constitution, *id.*, 41st Cong., 3d Sess. 1636 (Remarks of

Senator Vickers of Maryland). Senator Casserly of California stated "[i]n short, a power in Congress to legislate in execution of constitutional provisions never can be held to enlarge those provisions." *Id.*, 41st Cong., 2d Sess., App. 472.

Congress has enacted legislation pursuant to Section Two of the Amendment during three time periods: The Reconstruction Era,[31] from 1957 to 1964,[32] and in 1965 when it enacted the Act. The power of Congress has been examined at each juncture, and this Court has held consistently that Congress may not expand the normative content of the Fifteenth Amendment. This Court's early opinions reveal two central factors which compel the conclusion that Congress exceeded its powers in enacting Section Five of the Act to the extent that it sought to proscribe actions having only a disproportionate impact: (1) congressional power under Section Two of the Fifteenth Amendment is merely remedial because the Fifteenth Amendment prohibits discrimination and does not create a right to vote; and (2) this remedial power of Congress is triggered only if Section One of the Fifteenth Amendment is violated.

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[31] Civil Rights Act of 1875, Act of March 1, 1875, ch. 114, §§ 3-5, 18 Stat. 336, 337 (1875) (current version of § 5 at 42 U.S.C. § 1984 (1970)); Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871); Enforcement Act of 1870, Act of May 31, 1870, ch. 114, 16 Stat. 140 (1870), *as amended by* Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871) (current versions at 42 U.S.C. §§ 1981, 1983 (1970)). Most of the provisions which were not struck down by the Court were repealed in 1894. Act of Feb. 8, 1894, 28 Stat. 36 (1894).

[32] Civil Rights Act of 1964, Pub. L. No. 8-352, 78 Stat. 241 (codified in scattered sections of 28, 42 U.S.C. (1970)); Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified in scattered sections of 18, 20, 42 U.S.C. (1970)); Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified in scattered sections of 5, 28, 42 U.S.C. 1970)).

The recent decisions of this Court in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), have raised serious questions [33] as to this Court's current position with regard to the power of Congress to expand the normative scope of the Fourteenth Amendment, and the implication of a correlative power under the Fifteenth Amendment. Rome submits that this apparent conflict can be satisfactorily resolved by a careful analysis of those opinions in light of the history of the Fifteenth Amendment and this Court's traditional interpretation of the power of Congress. Rome contends that this Court has not held that Congress may expand the substantive content of the rights toward which such remedies are directed.

(i) *The Reconstruction Era Cases*

The cases construing the Reconstruction Era legislation hold that the scope of delegated congressional power depends upon the structure of the constitutional provision upon which that power is based:

> Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are *secured by way of prohibition* . . . . The truth is, that the implication of a power to legislate in this manner [Civil Rights Act of 1875] is based upon the assumption that if the States are forbidden to legislate or act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally upon that subject, and not merely power to provide modes of redress against such State legislation or action. The assumption is certainly unsound. *It is repugnant to the Tenth Amendment of the Constitution* . . . .

The Civil Rights Cases, 109 U.S. 3, 11-15 (1883) (emphasis added).

"The whole scope and effect of this series of decisions is that . . . certain fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against a violation or abridgement by the United States or by the States, as the case may be, and *cannot therefore be affirmatively enforced by Congress* . . . ." *Logan* v. *United States*, 144 U.S. 263, 293 (1892) (emphasis added). Where the Court has found federally created rights, it has found plenary congressional power to enforce those rights. *See, e.g., Ex parte Yarbrough*, 110 U.S. 651 (1884) (power of Congress to protect a citizen from violence while voting in a federal election); *Logan* v. *United States*, 144 U.S. 263 (1892) (power of Congress to protect a federal prisoner from violence while under custody of a federal officer). On the other hand, where Congress acts pursuant to a prohibitory Amendment, its powers are limited. The Fifteenth Amendment "does not confer the right of suffrage on anyone. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous

[33] *See, e.g.*, Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); Monaghan, *Foreword, Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); and Beer v. United States, 425 U.S. 130, 148 n.4 (1976) (BRENNAN and MARSHALL, J.J., dissenting).

condition of servitude . . . ." *United States* v. *Harris,* 106 U.S. 629, 637 (1883). "It is only when the wrongful refusal at such an election is *because* of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment." *United States* v. *Reese,* 92 U.S. 214, 218 (1875) (emphasis added).[34]

In overturning portions of the Enforcement Act of 1870,[35] the Court held that: "[W]e find . . . no words of limitation, or reference even, that can be construed as manifesting any intention to *confine its provisions to the terms of the Fifteenth Amendment,*" and therefore that "Congress has not yet provided by 'appropriate legislation' for the punishment of the offense charged in the indictment . . . ." *Id.* at 220-21 (emphasis added). Similarly, in *James* v. *Bowman,* 190 U.S. 127 (1903), this Court struck down a statute[36] which did not require an allegation of intent:

> True, the parties who were bribed were alleged to be "men of African descent," . . . and again that they were "persons to whom the right of suffrage and the right to vote was then and there guaranteed by the Fifteenth Amendment." . . . *But this merely describes the parties wronged as within the classes named in the amendment* . . . . [*A*]*n indictment which charges no discrimination on account or race, color, or previous condition of servitude is . . . destitute of support by such amendment.*

Id. at 139. (emphasis added). These Reconstruction Era cases show that Congress may not affirmatively enforce the franchise, but Congress may only provide remedies for intentional discrimination.

(ii) *The Remedial Legislation from 1957 to 1964*

In the late 1950's and early 1960's, Congress enacted several statutes[37] designed to facilitate case-by-case litigation against voting discrimination. This remedial legislation was unanimously upheld,[38] and this Court maintained its earlier position that the power of Congress is triggered only by a substantive constitutional violation. For example, in *Louisiana* v. *United States,* 380 U.S. 145 (1965), the United States brought an action pursuant to 42 U.S.C. § 1971 to enjoin the enforcement of a Louisiana "interpretation" provision. The Court found that the provision violated the Fifteenth and Fourteenth Amendments as well as the congressional statute and specifically held that "[t]here can be no doubt from the evidence in this case that the District Court was amply justified in finding that Louisiana's interpretation test, as written and as applied,

[34] The language of this Court in 1875 with respect to the Enforcement Act is strikingly similar to this Court's recent pronouncement in Personnel Adm'r v. Feeney, 47 U.S.L.W. 4650, 4656 (U.S. June 5, 1979) (No. 78-233), that discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

[35] Act of May 31, 1870, ch. 114, §§ 3-4, 16 Stat. 140 (1870).

[36] Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871).

[37] *See* note 32, *supra.*

[38] *See, e.g.,* United States v. Mississippi, 380 U.S. 128 (1965); Hannah v. Larche, 363 U.S. 420 (1960); United States v. Raines, 362 U.S. 17 (1960); Alabama v. United States, 304 F.2d 583 (5th Cir.) *aff'd per curiam,* 371 U.S. 37 (1962); United States v. McElveen, 180 F.Supp. 10 (E.D. La.) *aff'd per curiam sub nom.* United States v. Thomas, 362 U.S. 58 (1960).

was part of a *successful plan to deprive* Louisiana Negroes of their right to vote." *Id.* at 151 (emphasis added).

(iii) *Cases Construing the Voting Rights Act of 1965*

By 1965, Congress found that case-by-case litigation was inadequate and enacted the Act because "some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." *South Carolina* v. *Katzenbach,* 383 U.S. 301, 314 (1966). Although this Court generally upheld the constitutionality of the Act in *South Carolina* v. *Katzenbach,* a careful examination of the opinion reveals two significant facts. First, the discussion of the power of Congress was limited to the argument set forth by the State of South Carolina "[t]hat Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to the particular localities must necessarily be left entirely to the courts." *Id.* at 327. Rome does not argue that Congress has no power to fashion specific remedies; it asserts that those remedies must be tailored to rights contained in Section One of the Fifteenth Amendment.

Second, it is clear that this Court, in upholding the constitutionality of the Voting Rights Act, assumed that it was dealing with provisions which violated Section One of the Fifteenth Amendment. For example, the Court stated that "[t]he record shows that in most

of the States covered by the Act, . . . various tests and devices have been instituted *with the purpose* of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years." *Id.* at 333-34. Specifically, with respect to Section 5, the Court stated that "[t]he Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use *would violate the Fifteenth Amendment.*" *Id.* at 334 (emphasis added).

Although this Court has often cited *South Carolina* v. *Katzenbach* with approval since 1966, see note 57, *infra,* the issue of whether Congress may prohibit electoral changes solely on the basis of disproportionate impact was not raised, and indeed members of this Court stated directly that "§ 5 is *undoubtedly tied to the standards of the Constitution.*" *Beer* v. *United States,* 425 U.S. 130, 148 (1976) (BRENNAN and MARSHALL, J.J., dissenting) (emphasis added).

In *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), this Court upheld the constitutionality of Section 4(e) of the Act which prohibited an English literacy requirement for persons who had been educated in certain non-English speaking schools. The first rationale for the decision was that Congress found that the state had intentionally discriminated against Spanish-speaking citizens in the furnishing of governmental services, and that the prohibition of a discriminatory literacy test was an appropriate remedy for that constitutional violation. *Id.* at 652-53. This Court, therefore, held that the prohibition of the literacy test was appropriate legislation to enforce the right to governmental

services, a clearly recognized object of the Fourteenth Amendment.[39]

The second rationale rested upon deference to congressional findings that the use of an English literacy test was an intentional denial of voting rights and, thus, a denial of equal protection. The Court had previously interpreted the Fourteenth Amendment to cover the right to vote. *See, e.g., Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); *Louisiana* v. *United States,* 380 U.S. 145 (1965); *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Nixon* v. *Condon,* 286 U.S. 73 (1932); and *Nixon* v. *Herndon,* 273 U.S. 536 (1927). The Court, therefore, did not hold that Congress could expand the substantive content of the Fourteenth Amendment to cover voting rights but deferred to a congressional finding that the English literacy requirement did in fact deny equal protection in light of the earlier holdings of the Court.[40] It was held that:

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[39] Prior decisions of the Court had held that the equal protection clause encompasses equal access to governmental services. *See, e.g.,* Turner v. City of Memphis, 369 U.S. 350 (1962); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[40] As stated by Justice Harlan:

> "It is suggested that the proper basis for the doctrine enunciated in *Morgan* lies in the relative factfinding competence of Court, Congress, and state legislatures . . . . In this view, as I understand it, since Congress is at least as well qualified as a state legislature to determine factual issues, and far better qualified than this Court, where a dispute is basically factual in nature the congressional finding of fact should control, subject only to review by this Court for reasonableness.
>
> In the first place, *this argument has little or no force as applied to the issue [of] whether the Fourteenth Amendment covers voter qualifications.* Indeed I do not understand the adherents of *Morgan* to maintain the contrary."

Oregon v. Mitchell, 411 U.S. 112, 205-06 (1970) (HARLAN, J., concurring in part and dissenting in part) (emphasis added).

> Congress might well have questioned, in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these [legitimate reasons] were actually the interests being served . . . . Since Congress undertook to legislate so as to preclude the enforcement of state law, and did so in the context of a general appraisal of literacy requirements for voting, . . . to which it brought especially informed legislative competence, it was Congress' prerogative to weigh these competing considerations.

Katzenbach v. *Morgan* at 654-56.

This Court also dealt with the power of Congress to expand the substantive scope of the Fourteenth Amendment in *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), which upheld a provision enfranchising 18-year old voters in its application to federal elections, but not state elections, upheld a ban on literacy tests in both state and federal elections, and upheld a ban on residency requirements in presidential and vice-presidential elections. Four Justices voted to sustain the 18-year old vote provision in its entirety; four other Justices voted to invalidate the provision in its entirety. Only Justice Black drew a distinction between federal and state elections, and he, therefore, announced the judgments of the Court in an opinion expressing his own view of the case. An analysis of the five opinions written in the case reveals that the votes were based on several grounds, all of which are consistent with the traditional interpretation of the power of Congress.

Numerous affirmative votes recognized the traditional plenary power of Congress to enforce federally created rights: Justice Black recognized congressional

power to regulate federal elections;[41] Justice Douglas recognized power to enforce the privileges and immunities provided by Article IV, Section 2 of the Constitution;[42] Justices Brennan, White and Marshall recognized congressional power to enforce the right to interstate travel and settlement;[43] and Justices Burger, Stewart and Blackmun recognized congressional power to enforce the right to travel from state to state.[44] Justice Harlan voted to strike down the 18-year old vote provision and the residency requirement because of the absence of such federally created rights.[45] Justice Black voted to strike down the 18-year old vote provision with respect to state elections based upon the failure of Congress to find facts to support a violation of the Fourteenth Amendment.[46] Many affirmative judgments were based upon deference to a congressional finding of fact that a provision did violate the Fourteenth or Fifteenth Amendments: Justices Douglas[47] and Brennan, White, and Marshall[48]

[41] 400 U.S. at 119-24, 134 (BLACK, J., announcing the judgments of the Court).

[42] *Id.* at 148 & n.12 (DOUGLAS, J., concurring in part and dissenting in part).

[43] Id. at 237 (BRENNAN, WHITE, and MARSHALL, J.J., concurring in part and dissenting in part).

[44] *Id.* at 285-86 (BURGER, C.J. and STEWART and BLACKMUN, J.J., concurring in part and dissenting in part).

[45] *Id.* at 209-12 (HARLAN, J., concurring in part and dissenting in part).

[46] *Id.* at 129-30 (BLACK, J., announcing the judgments of the Court).

[47] *Id.* at 141 (DOUGLAS, J., concurring in part and dissenting in part).

[48] *Id.* at 240 (BRENNAN, WHITE, and MARSHALL, J.J., concurring in part and dissenting in part).

deferred to such a finding with respect to the 18-year old vote provision; Justices Black,[49] Douglas,[50] Brennan, White, and Marshall[51] and Burger, Stewart and Blackmun[52] did so with respect to literacy tests; Justices Douglas,[53] Burger, Stewart and Blackmun[54] gave such deference with respect to residency requirements. Justice Harlan voted to strike down the 18-year old vote provision and the residency requirements based upon a finding that the Fourteenth Amendment does not cover voting rights.[55] Finally, Justices Burger, Stewart and Blackmun concluded with respect to the 18-year old vote provision:

> [Section] 302 is valid only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of *substantive* constitutional law what situations fall within the ambit of the clause, and what state interests are "compelling". . . . [T]o sustain the constitutionality of § 302 would require an enormous extension of that decision's [Katz-

[49] *Id.* at 132-33 (BLACK, J., announcing the judgments of the Court).

[50] *Id.* at 147 (DOUGLAS, J., concurring in part and dissenting in part).

[51] *Id.* at 235 (BRENNAN, WHITE, and MARSHALL, J.J., concurring in part and dissenting in part).

[52] *Id.* at 283 (BURGER, C.J. and STEWART and BLACKMUN, J.J., concurring in part and dissenting in part).

[53] *Id.* at 148 (DOUGLAS, J., concurring in part and dissenting in part).

[54] *Id.* at 285-86 (BURGER, C.J. and STEWART and BLACKMUN, J.J., concurring in part and dissenting in part).

[55] *Id.* at 206-13 (HARLAN, J., concurring in part and dissenting in part).

> enbach v. Morgan's] rationale. I cannot but conclude that § 302 was beyond the constitutional power of Congress to enact.

400 U.S. at 296 (BURGER, C.J. and STEWART and BLACKMUN, J.J. concurring in part and dissenting in part) (emphasis added). Hence, though the members of the Court reacted in differing ways to the issues presented by the *Oregon* v. *Mitchell* case, the opinions of each Justice are consistent with Appellants' view of the substantive content of the Amendment.

Applying these principles to Section 5 of the Act, it is clear that Congress exceeded the scope of its powers if it attempted to prohibit electoral changes solely on the basis of disproportionate racial impact. The Fifteenth Amendment prohibits discrimination *on account of* race, color, or previous condition of servitude. Therefore, Congress may only act to prohibit discrimination *on account of* race, color, or previous condition of servitude. Rome submits that "Congress may only 'enforce' the provisions of the amendments and may do so only by 'appropriate legislation.' " *Id.* at 128 (BLACK, J., announcing the judgments of the Court). The "provisions" of the Amendment do not include the proscription of innocent electoral changes and annexations. Moreover, such innocent actions may not be proscribed under authority to enact "appropriate legislation."

C. Congress may not through the creation of irrebuttable presumptions of invidious purpose proscribe actions having only a racially disproportionate impact.

The creation of an irrebuttable presumption of invidious purpose from the existence of racially disproportionate impact is not "appropriate legislation" to remedy intentional discrimination. Appellants have previously surveyed this Court's treatment of "irrebuttable presumptions." See pp. 27-28, ***supra***. The statutory infirmities of such presumptions are even more compelling in the constitutional context. Such presumptions, if indeed they were established by the Congress in 1965, are not "appropriate legislation" because of their inherent irrationality. In an analogous context, which provides the following paraphrase, this Court deemed such presumptions not to be appropriate because of the lack of any rational connection between the "naked statistical argument," and the constitutional value which Congress sought to protect:

> [G]iven the heterogeneity of the Nation's population, it would only be an *infrequent coincidence* that the racial composition of each [electoral change] was identical to that [previously in effect]. The acceptance of [the government's] theory would render suspect each difference in [racial impact], however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current [municipal government] could survive such scrutiny.

Jefferson v. *Hackney*, 406 U.S. 535, 548 (1972) (emphasis added).

D. Summary.

Appellants submit that if Section 5 of the Act prohibits electoral changes and annexations innocent of purposeful discrimination, it exceeded the powers constitutionally delegated to the Congress, because purposeful action is a precondition to the violation of the

Fourteenth and Fifteenth Amendments. Moreover, Congress may not, through its enforcement powers, expand the terms of the Amendments, and it may not proscribe such actions through the use of irrebuttable presumptions. If Appellants' view of the proper construction of Section 5 is not accepted, then Appellants assert that the provision must be declared unconstitutional.

IV. Section 5 of the Act Unconstitutionally Intrudes Upon Basic Concepts of Federalism and Rights Guaranteed by the First, Fifth, Ninth, and Tenth Amendments of the Constitution.

South Carolina v. *Katzenbach*, 383 U.S. 301 (1966), established the basic constitutional test against which legislation such as Section 5 must be measured: "[h]as Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" *Id.* at 324. This test was refined by Mr. Justice Black in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), when he established the criteria for evaluating legislation enacted by Congress pursuant to its powers under Section Two of the Fifteenth Amendment, including the recognition that Congress may not strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority. *Id.* at 128.[56]

[56] The other criteria were, first, that Congress could only "enforce" the provisions of the Amendments by appropriate legislation, see p. 66, *supra*, and, second, that Congress may not by legislation repeal other provisions of the Constitution. Oregon v. Mitchell, 400 U.S. 112, 128 (1970). In the context of the case at bar, the "other provisions of the Constitution" are not only the Federalism principles of Article IV, Section 4 and the Tenth Amendment, see pp. 73-84, *infra*, but also the First, Fifth, Ninth, and Tenth Amendments, as protections of the rights of the citizens of Rome. See pp. 84-89, *infra*.

In *South Carolina* v. *Katzenbach*, this Court held that Section 5 was constitutional, but Chief Justice Warren indicated that the determination was based upon the circumstances then existing as well as the temporary nature of the Act. Appellants propose that the conditional nature of this constitutional imprimatur permits this Court to take a fresh look at the fundamental constitutional issue.[57] Appellants also argue that it is now apparent that the operation of Section 5 violates basic individual rights in a manner not anticipated when its constitutionality was first considered.

The limited sanction of the Act was indicated by the Court's reliance, in *South Carolina* v. *Katzenbach*, on *Wilson* v. *New*, 243 U.S. 332 (1917), and *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934). *South Carolina* v. *Katzenbach* at 334-35. In *Wilson* v. *New*, the constitutional justification for the possible infringement upon due process rights was the necessity of the legislation to "save the . . . disaster, . . . injury, . . . suffering . . . which will be brought to many among the vast body of the people. . . ." 243 U.S. 342.

[57] The statement that Section 5 is constitutional has been supported by the frequent citation of many familiar cases, beginning, of course, with South Carolina v. Katzenbach, 383 U.S. 301 (1966). Indeed, the court below did so and cited United Jewish Organizations v. Carey, 430 U.S. 144, 157 (1977) (plurality opinion); *id.* at 180 n* (STEWART, J., concurring in the judgment); Beer v. United States, 425 U.S. 130, 133 (1976); Georgia v. United States, 411 U.S. 526, 553 (1973); Allen v. State Bd. of Elections, 393 U.S. at 548; Wilkes County v. United States, 450 F. Supp. 1171, 1177 (D.D.C.), *aff'd*, 99 S.Ct. 606 (1978). To that list could have been added Morris v. Gressette, 432 U.S. 491, 495 n.2 (1977) and Dougherty County Bd. of Educ. v. White, 99 S.Ct. 368, 372 n.6 (1978). South Carolina v. Katzenbach is fully discussed herein. Analysis of the other cases reveals that one held the Act constitutional as applied to the facts of that particular case (Georgia v. United States, 411 U.S. at 532-34), and the issue was not before the Court in the others.

The Court held the legislation appropriate under such circumstances. *Id.* at 351. *Home Building & Loan Association* v. *Blaisdell* involved a chailenge to the constitutionality of a Minnesota mortgage moratorium law that impaired the obligations of contracts but that was to remain in effect only during the continuance of an emergency and in no event beyond a given date. 290 U.S. at 416. The Court upheld the statute because the existing emergency "furnished a proper occasion for the exercise of a reserve power of the State to protect the vital interests of the community." *Id.* at 444. Among other factors this Court considered the statute to be constitutional because "[t]he legislation is temporary in operation." *Id.* at 447.

As in *Home Building & Loan Association* v. *Blaisdell* and *Wilson* v. *New,* this Court, in *South Carolina* v. *Katzenbach,* determined that Section 5 of the Act was appropriate legislation in light of "unique circumstances" then existing in the covered jurisdictions. Recently in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), this Court recognized the same principle when it overruled *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), but sustained *Fry* v. *United States,* 421 U.S. 542 (1975). The Court, finding its holding in *National League of Cities* consistent with *Fry,* pointed out that:

> The enactment at issue there [in *Fry*] was occasioned by an extremely serious problem which endangered the well-being of all the component parts of our federal system and which only collective action by the National Government might forestall.

426 U.S. at 853. The Court pointed out that, unlike the situation in *Maryland* v. *Wirtz,* in enacting the Economic Stabilization Act of 1970,

> [t]he means selected were carefully drafted *so as not to interfere with the States' freedom beyond a very limited, specific period of time* . . . . [and the Act] displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves.

Id. (emphasis added). Appellants submit that the choice of cases made by the Court in *South Carolina* v. *Katzenbach* to support the constitutionality of Section 5 permits a contemporary review of the appropriateness of Section 5.

The emergency to which the Act was directed in 1965 is demonstrated by the fact that in Mississippi only 6.8% of the voting age blacks were registered, in Alabama only 23.1%, in Louisiana 32.0%, in South Carolina 38.8%, in Georgia 44.1%, and in Virginia 45.8%.[58] As the Court noted in *South Carolina* v. *Katzenbach,* in many of these states, registration of voting age whites ran roughly 50 percentage points or more ahead of black registration. *South Carolina* v. *Katzenbach* at 313.

The contrast between the emergency of 1965 and the facts upon which Congress acted in extending the Act in 1975 is dramatic. As the report of the Senate Judiciary Committee indicated:

> The Voting Rights Act has been extremely effective in terms of diminishing barriers to and improving minority voting and registration throughout the covered areas. Registration rates for blacks in the covered southern jurisdictions has continued to increase since the passage of the Act. For exam-

[58] Figures originally published by Voter Education Project, Inc. 1972. Reprinted in *Hearings on S.407 et al. Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. at 658 (hereinafter cited as the *Senate Hearings of 1975*), reprinted from U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 53 (1975).

ple, while only 6.7 percent of the black voting age population in Mississippi was registered before 1965, 63.2 percent of such persons were registered in 1971-1972.

S. REP. No. 94-295, 94TH CONG. 1ST SESS. at 13 (1975).

The registration data available to the Congress in 1975, with respect to black registration in 1972, indicated a national norm of 65.5% of the voting age population,[59] while in Mississippi the figure was 62.2%, in Alabama 57.1%, in Louisiana 59.1%, in South Carolina 48.0%, in Georgia 67.8%, and in Virginia 54.0%.[60] By 1976, the national percentage of the black voting age population registered to vote was 58.5%.[61] The figure for the northeastern portion of the United States was 54.7%.[62] In contrast, in Alabama 58.1% of the black voting age population was registered to vote, in Georgia the figure was 56.3% and in Louisiana 63.9%, in Mississippi 67.4%, in South Carolina 60.6%, and in Virginia 60.7%. *Id.*[63]

[59] U.S. Bureau of the Census, *Current Population Reports,* Series P-20, No. 253, *Voting and Registration in the Election of November 1972* (1973).

[60] *Senate Hearings of 1975, supra* note 58 at 658. Originally published by Voter Education Project, Inc., 1972. Reprinted from U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 53 (1975).

[61] U.S. Bureau of the Census, *Current Population Reports,* Series P-20, No. 322, *Voting and Registration in the Election of November 1976* (1978).

[62] *Id.* at 122. "Northeast" includes Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont.

[63] U.S. Bureau of the Census, *Current Population Reports: Special Studies, Series P-23, No. 74, Registration and Voting in November, 1976 in Jurisdictions Covered by the Voting Rights Act Amendments of 1975* (1978).

This data, which is graphically illustrated below,[64] is an indication that the emergency with respect to which Congress acted in 1964 has passed and that this Court should look again at the remedies approved in *South Carolina* v. *Katzenbach,* as extended in 1975, and measure them against the constitutional principles of Federalism and the rights of political participation guaranteed to all citizens.

A. Section 5 encroaches upon basic concepts of Federalism.

The preclearance requirement of Section 5 is an extraordinary remedial provision which undeniably encroaches upon state sovereignty. One authority recently argued that a provision with such attributes violates

[64] PERCENTAGE OF PERSONS OF VOTING AGE REGISTERED

1964 Pres. Elect.	U.S.	ALA	GA	LA	MISS	S.C.	VA
All Persons	NA	NA	63.4	63.5	45.9	58.0	51.4
White	NA	70.0	74.6	80.5	70.2	78.5	56.0
Black	NA	23.1	44.1	32.0	6.8	38.8	45.8
1972 Pres. Elect.							
All Persons	72.3	76.2	70.0	75.2	65.5	59.1	56.9
White	73.4	80.7	70.6	80.0	71.6	51.2	61.2
Black	65.5	57.1	67.8	59.1	62.2	48.0	54.0
1976 Pres. Elect.							
All Persons	66.7	71.4	69.2	74.6	74.3	62.9	64.9
White	68.3	75.4	73.2	79.1	77.7	64.1	67.0
Black	58.5	58.1	56.3	63.9	67.4	60.6	60.7

not merely a particular provision of the Constitution such as the Guarantee Clause or the Tenth Amendment but the entire federal structure of the Constitution:

> Congressional action which treats the states in a manner inconsistent with their constitutionally recognized independent status, therefore, should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant of authority, but because it would be contrary to the structural assumptions of the Constitution as a whole.

TRIBE, *supra* note 17 at 301.

This Court gave contemporary significance to the principles of Federalism in *National League of Cities* v. *Usery*, 426 U.S. 833 (1966)[65] where it was held that Congress may not "impair the States 'ability to function effectively in a federal system,' " *id.* at 852 (citation omitted); the Federal Government may not intrude upon the exercise by the States of "integral government functions," *id.* at 851, necessary to their "separate and independent existence," *id.* at 845. The Court recognized that the rights of States *qua* States are affirmative limitations upon the powers of the central government in the same manner as the limitations imposed by the individual rights amendments to the Constitution. *Id.* at 845.[66] Furthermore, as the Court's opinion noted, these limitations extend to the rights of cities. *Id.* at 855-856, n.20.

[65] Other recent cases have addressed the concept of Federalism. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) and Hutto v. Finney, 437 U.S. 678, (1978) recognize the abrogation of the States' Eleventh Amendment immunity by the Fourteenth Amendment; however, those cases involved mere monetary recovery against States. Such an exercise of congressional power pales next to the significant and undeniable encroachment of Section 5 upon the functions most "essential to the separate and independent existence of the States and their governments"—elections. Oregon v. Mitchell, 400 U.S. 112, 125 (1970).

Integral and traditional governmental functions of a State and its political subdivisions include the conduct of elections and enactment of laws, especially where no discriminatory intent is present. Indeed, Appellees agree that this is so as a matter of fact, see App. at 85-86, and this Court has established it as a matter of law:

> No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices.

Oregon v. *Mitchell*, 400 U.S. 112, 125 (1970).

Mr. Justice Black's dissents in *Perkins* v. *Matthews*, 400 U.S. at 401-09; *Allen* v. *State Board of Elections*, 393 U.S. at 595-97; and *South Carolina* v. *Katzenbach*, 383 U.S. at 355-362, recognized that Section 5 effectively gives federal officials a veto power over state and local laws, directly contrary to Article IV, Section 4 of the Constitution, which commands: "The United States shall guarantee to every State in this Union a Republican Form of Government." The concerns of Mr. Justice Black take on additional significance when viewed in the context of the broad scope given by this Court to Section 5. The list compiled in *Sheffield* speaks for itself:

> Our decisions have required federal preclearance of laws changing the location of polling places . . .

[66] Hence, congressional action affecting States must be "closely drawn." See p. 87, n. 78, *infra*.

> laws adopting at-large systems of elections . . . laws providing for the appointment of previously elected officials . . . laws regulating candidacy . . . laws changing voting procedures . . . annexations . . . and reapportionment and redistricting.

435 U.S. at 110 (citations omitted).

This Court in *In re Duncan,* 139 U.S. 449 (1891), in a unanimous opinion by Mr. Chief Justice Fuller, classically stated the scope of the Guarantee Clause:

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power as against the sudden impulses of mere majorities.

Id. at 461. Mr. Justice Black's dissents indicate his concern that Section 5 violates the Guarantee Clause by creating two functionally dissimilar sets of States in the Union—one self-determined and one determined either by the Attorney General of the United States or by the District Court in Washington.

Appellants are aware of the substantial number of instances in which particular disputes relating to Article IV, Section 4 have been held to be nonjusticiable, as "political questions." *E.g., Luther* v. *Borden,* 48 U.S. (7 How.) 1 (1849). Indeed, the court below so held with respect to Rome's argument, citing *Luther* v. *Borden,* and *Baker* v. *Carr,* 369 U.S. 186 (1962). Juris. State. at 42b.[67] However, *Baker* v. *Carr* itself recognizes that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." 369 U.S. at 209.[68]

In deciding the justiciability of political questions, and "the distribution of power between this Court, the Congress, and the Chief Executive," *id.* at 242-43, the appropriateness of judicial deference to congres-

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[67] Modern cases certainly give more than lip service to the provision. See Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *vacated and remanded per curiam sub nom.* EPA v. Brown, 431 U.S. 99 (1977); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated and remanded per curiam,* 431 U.S. 99 (1977); Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966) *cert. denied,* 386 U.S. 1021 (1967); Dawson v. Vance, 329 F. Supp. 1320 (S.D. Tex. 1971). These modern cases have acknowledged that while state sovereignty has been diminished in some areas by the exercise of congressional authority, "it is equally true that if there is any attribute of sovereignty left to the states it is the right of their legislatures to pass, or not to pass, laws." Maryland v. EPA, 521 F.2d at 225. The ability of the Attorney General, or actually of his staff, to render laws ineffective by refusing to preclear them is clearly a veto power. Such treatment of the laws of States and cities is hardly consistent with the Guarantee Clause. It is similar to the type of treatment recognized in Dawson v. Vance, 329 F.Supp. at 1326, as "opposite" to the Guarantee Clause: "to lightly subject state statutes . . . to precipitate and peremptory federal court equitable review absent extraordinary circumstances." Under Section 5, however, review may not even be judicial; it may be administrative. Indeed, one Justice of this Court has suggested that Section 5, which should be treated with "solemnity," may have been reduced to "a trivial, though burdensome, administrative provision." United States v. Board of Commissioners, 435 U.S. at 148 n.11 (STEVENS, J., dissenting).

[68] Quoting the same language from In re Duncan, 139 U.S. 449 (1891), quoted in the text above, Baker v. Carr observes, "But the Court did not find any of these fundamental principles violated." 369 U.S. at 222 n.48.

sional judgments concerning Federalism should be carefully examined,[69] because institutional safeguards may not always be present.[70] The argument against total judicial deference to congressional judgments concerning Federalism is even stronger when legislation intrudes on the Federalism interests of only a specified few states. Congressmen can be counted on

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[69] Justice Douglas, in 1962, answered the following question, a form of which could easily be asked of Section 5, in the negative: "Today would this Court hold nonjusticiable or 'political' a suit to enjoin a Governor who, like Fidel Castro, takes everything into his own hands and suspends all election laws?" Baker v. Carr, 369 U.S. at 246 n.3 (DOUGLAS, J., concurring).

[70] Professor Herbert Wechsler has argued that the political power of the States, as represented in the structure of Congress, provides sufficient protection for the values of Federalism in the American system of government. Wechsler, ***The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government***, 54 COLUM. L. REV. 543 (1954). The doctrine received recent attention in Massachusetts v. United States, 435 U.S. 444 (1978), wherein it was noted that the political process is "uniquely adapted to accommodating the competing demands for national revenue, on the one hand, and for reasonable scope for the independence of state action, on the other." *Id.*, at 456. *See* Helvering v. Gerhardt, 304 U.S. 405, 416 (1938); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436-37 (1819). The Congress, "composed as it is of members chosen by state constituencies, constitutes an inherent check against the possibility of abusive taxing of the States by the National Government." Massachusetts v. United States, 435 U.S. at 456. But in a note to this portion of his opinion, Mr. Justice Brennan recognized a judicial role in restraining national encroachments on Federalism:

> Although the opinion for the Court in [*Usery*] rejects the argument that the operation of the political process eliminates any reason for reviewing federalism based challenges to federal regulation of the States *qua* States, we do not believe it follows that the existence of 'political checks' has no relevance to a determination of the proper *scope* of a State's immunity from federal taxation.

Id. at 456 n.13.

not so much to protect Federalism as to protect their home state's interests. When a statute affects only a small number of states, representatives safeguarding their states' interests are easily outvoted by those states not subject to the provision in question. The balance of state interests in the Senate and the political check offered thereby are thus upset; and one of the great values of Federalism, protection from arbitrary majoritarianism, is lost. With respect to Section 5, Justice Black perceived this reality. *See Perkins* v. *Matthews*, 400 U.S. 379, 401-407 (1971) (BLACK, J., dissenting). Other members of this Court have made similar observations. *See Berry* v. *Doles*, 438 U.S. 190, 200 n.5 (1978) (POWELL, J., concurring); *United States* v. *Board of Commissioners*, 435 U.S. at 139 n.1 (POWELL, J., concurring); *Georgia* v. *United States*, 411 U.S. 526, 545 n.1 (1973) (POWELL, J., dissenting); *Allen* v. *State Board of Elections*, 393 U.S. at 585 (HARLAN, J., concurring in part). Very recently Mr. Justice Rehnquist in *Columbus Board of Education* v. *Penick*, 47 U.S.L.W. 4924 (U.S. July 2, 1979) (No. 78-610), recognized this principle with his quotation of Cicero that there should not be "one law at Rome and another at Athens . . . but the same law." *Id.* at 4935.

The practical operation of Section 5 supports the conclusion that it is now unconstitutional. First, both of the procedures prescribed by Congress for obtaining preclearance of the electoral changes in a covered jurisdiction have proven intrusive and burdensome. The obvious costs to a covered jurisdiction of obtaining a declaratory judgment in a forum many miles away are underlined by the size of the record in the case presently before the Court and the fact that it has

been in litigation for over three years."[71] Because Congress recognized the onerousness involved in the declaratory judgment procedure, it provided what was to be a "rapid method" for covered jurisdictions to obtain preclearance of electoral changes. *Allen* v. *State Board of Elections,* 393 U.S. at 549. Yet, with the expanded interpretation which this Court has given to the phrase "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," the volume of submissions required from states, counties, cities, towns, and even organizations such as school boards which have no responsibility whatever for voting has reached significant proportions.[72] See App. at 171-180.

The intrusiveness of the burdens created by the Section 5 preclearance procedure is magnified by the statistics of the Justice Department indicating that, although it is receiving four submissions (and some with multiple changes) per day, see *Berry* v. *Doles,* 438 U.S. 190, 201 n.6 (1978), (POWELL, J., concurring in the judgment), the objection rate for Section 5 submissions is currently 0.2%. See p. 1c, *infra.* The preclearance procedure, having evolved into a mere "inventory of voting procedures," has become a "dead

[71] Although this burden would be substantial to any unit of government forced to shoulder it, it is even more serious to a city the size of Rome.

[72] A study was undertaken by the State of Texas to determine the burdensomeness of the Section 5 requirement on state officials alone and concluded that over 35,000 man-hours were devoted to compliance with Section 5 in less than a year. See Second Request by Plaintiffs for Admissions of Fact and Genuineness of Documents, Exhibit "B," City of Rome v. United States, No. 77-0797 (D.D.C. Apr. 9, 1979).

letter," *Georgia* v. *United States,* 411 U.S. 526, 531, 538 (1973), for any meaningful purposes and yet remains a "trivial, though burdensome, administrative provision," *United States* v. *Board of Commissioners,* 435 U.S. at 148 n.11 (BURGER, C.J., and REHNQUIST and STEVENS, J.J., dissenting), for both the plethora of covered jurisdictions and for the Attorney General. The scope of Section 5, as a purported remedy, goes far beyond the scope of the arguable violations ascertained, and when the compliance burden to covered jurisdictions is weighed against the resulting objections, the procedure is even less supportable. *See National League of Cities* v. *Usery,* 426 U.S. 833, 856 (1976) (BLACKMUN, J., concurring).

Section 5, designed as a mechanism to provide covered jurisdictions with a "rapid method" of preclearance, is not functioning in this manner. Although the statutory language of Section 5 and the regulations of the Attorney General require the Attorney General to act on a submission within sixty days, "catch 22's" abound. The sixty days do not begin until the Justice Department has received a "complete" submission, and "completeness" is wholly within the Department's unreviewable discretion. *Morris* v. *Gressette,* 432 U.S. 491, 507 (1977). The sixty-day period does not begin until the submission is received by the Justice Department, and the Justice Department may wait until the sixtieth day to mail an objection; and if the objection falls on a holiday, the Department has until the next working day. 28 C.F.R. 51.3 (1978) See pp. 2b-3b *infra.* A determination that a submission is "inadequate," and the consequent suspension of the sixty-day limitation,

is a "frequent" occurrence."[73] *Hearings on H.R. 939 et al. Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. Ser. 1 at 302 (1975) (hereinafter cited as *House Hearings of 1975*). In short, the sixty-day limitation is not, in fact, a protection to the covered jurisdictions.

Also, the administrative preclearance process is actually not a process at all but rather an imposition of the will of the Attorney General, or his staff, by administrative fiat. There is no provision for a hearing and there are no written standards of review; there is a confidential file unavailable to submitting jurisdictions; and there is no requirement of findings of fact. *See generally* p. 1b-19b, *infra.* Indeed, there is not even the necessity to reach conclusions that the change is discriminatory. As Justices White, Powell, and Rehnquist observed, in dissent, in *Georgia* v. *United States,* 411 U.S. at 543-544:

> [W]hy should the State be forced to shoulder that burden where its proposed changes are so colorless that the country's highest legal officer professes his inability to make up his mind as to its legality?

Notwithstanding the breadth of the power of the Attorney General, his discretion is not subject to judicial review, *Morris* v. *Gressette,* 432 U.S. 491, 507 (1977). Indeed, according to the court below, even the *constitutionality* of his actions is not subject to judicial review. See Juris. State. at 6a-7a, note 3. Affirming the holding of the court below, Appellants submit, would create a singular incidence of administrative supremacy. It would not follow relevant language in *Georgia* v. *United States,* 411 U.S. at 541 n.13 (1973), and, more importantly, it would be contrary to the principle that the ultimate question of constitutionality should always be entitled to judicial review. *See St. Joseph Stockyards Co.* v. *United States,* 298 U.S. 38 (1936); *Heikkila* v. *Barber,* 345 U.S. 229 (1953). It is difficult to imagine a process which is more offensive to principles of Federalism than one which determines the efficacy of a state's laws in the absence of either basic due process protections or judicial supervision. See App. at 176-78.

[73] It is not unlikely that declination of a submission as inadequate may be *used* to gain time. See App. at 86-88.

Finally, the requirements of Section 5, as interpreted by the Attorney General and the court below, impose a form of political orthodoxy on covered jurisdictions which is antithetical to the most basic concepts of Federalism. Notwithstanding the salutory effects that provisions such as majority vote, staggered terms, numbered posts, residency requirements, and annexations may have on a city's government, see Juris. State. at 47b, App. at 202-204, if the position of the Justice Department and the court below is upheld, it will be virtually impossible for covered jurisdictions to enact nondiscriminatory provisions of this type. *Id.* at 47b-49b. This imposition of a political "point of view" upon covered jurisdictions is precisely the evil of which Justice Holmes warned almost sixty years ago:

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even

noxious to me and to those whose judgment I most respect.

Truax v. *Corrigan*, 257 U.S. 312, 344 (1921) (HOLMES, J., dissenting). If the narrow view of "good government" adopted by the Attorney General and supported by the court below is allowed to prevent the enactment of progressive and, in some cases, even vital legislation by jurisdictions covered by the Act, the governmental experimentation allowed by a heterogeneous federal system will be frustrated."[74] See App. at 179-80.

B. The operation of Section 5 seriously infringes upon the constitutional rights of Private Appellants.

As a result of the operation of the preclearance procedures of Section 5, elections for local office in the City of Rome have not been held since 1974.[75]

[74] One commentator has characterized the problem connected with such interference in the local political process as follows:

> Neither the D.C. Court nor the Justice Department, in other words, can be certain that one electoral arrangement is superior to the other. And the cost of judicial and executive interference into local electoral arrangements is considerable. When the Federal government intervenes in local electoral arrangements—when it attempts not simply to augment political opportunities but also to shape electoral results—it deprives the citizens of their right to achieve through conflict and conciliation those electoral arrangements most suited to their needs. *Thernstrom, supra* at 64-65.

[75] In spite of the fact that the infeasibility of elections in Rome is "technical," see Juris. State. at 43b, it is no less real. Such a characterization by the court below, together with the finding that the freezing of elections was partially caused by the officials of the City of Rome, Appellants respectfully submit, demonstrates several inevitable results of the enforcement concept of Section 5: a failure to appreciate the sanctity and seriousness of state laws; a failure to acknowledge the evolution of Section 5 and the history of its enforcement; a failure to recognize the practicalities, hardships, and, most important, the time required to change state laws; and the understandable bewilderment of all citizens of localities like Rome at not having elections. See App. at 210-13.

Many of these difficulties arose because Section 5 "remained practically dormant for several years," *House Hearings of 1975, supra* at 1480. It had barely begun to be implemented in 1969 and 1970. *Id.* at 169, 1480. "The Department of Justice did not adopt regulations implementing § 5's preclearance provisions until September 1971, six years after this Court's decision in *Allen*, [393 U.S. 544 (1969)]." United States v. Board of Commissioners, 435 U.S. at 148 (STEVENS, J., dissenting). *See also* Berry v. Doles, 438 U.S. at 197 n.1 (POWELL, J., concurring).

This "electoral deadlock" gives rise to Private Appellants Hamler and Hunter's [76] challenge to Section 5 as violative of their right to political participation and indicates that the operation of Section 5 violates basic rights guaranteed by the First, Fifth, Ninth, and Tenth Amendments.

Scheduled elections have not been held in Rome because the reduction of wards from nine to three, enacted in 1966 at the same time as the electoral changes presently before this Court, was precleared by the Attorney General and therefore effectively amended Rome's Charter. When this *effective* provision is inserted into the existing Charter without the changes which have not been precleared, the result is that Rome's Charter provides for a total of three commissioners, one from each of three wards, yet in every other respect contemplates a nine-member commission. Hence, for instance, the Charter requires a quorum of five in order to conduct city business. See Plaintiffs' Post Argument Brief at 1. These inconsistencies in the city charter would render the City Commission power-

[76] Because the question of whether a city has First Amendment rights has apparently never been decided, see City of Madison v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 n.7 (1976), City of Rome *in parens patriae* was also a plaintiff below.

less as a government. Moreover, when the Attorney General objected to the changes presently before this Court, the City Commission and Board of Education were already operating on a staggered term basis, and thus, to return to the "old law," it would be necessary to cut short the terms of some office holders. In such cases, the Georgia State Constitution requires legislative action, a popular referendum, and positive election results prior to the curtailment of the term of elected office holders, *Ga. Code Ann.* § 2-1309 (1977); *Ga. Code Ann.* § 47-801 (1979), and each of these actions and stages would require preclearance. Elections and election results in this chaotic posture are practically impossible. The city has been "left more or less at sea." See *Georgia* v. *United States,* 411 U.S. 526, 544 (1973) (WHITE, J., dissenting). See also App. at 209-213.

In addressing this perplexing problem, the court below justified this calcification of the electoral process in the interest of "enforcing the Fifteenth Amendment," Juris. State. at 43b, and commented that "[i]n any event, a five year suspension of elections during Section 5 litigation is by no means unusual." Juris. State. at 41b n.77." Appellants Hamler, Hunter, and the City of Rome, *in parens patriae,* submit that such a suspension is not only unusual but is violative of their basic rights to political participation.

This Court has consistently recognized and protected the continuing availability of the franchise and the

[77] The court pointed out that, at the time of remand by this Court, in cases involving the respective cities, New Orleans' elections had been frozen for six years and Richmond's elections had been frozen for five years. Nevertheless this result of Section 5 epitomizes the intrusiveness of the provision. See App. at 210-13.

right to political participation for all citizens. *See Illinois State Board of Elections* v. *Socialist Workers Party,* 47 U.S.L.W. 4197 (U.S. Feb. 22, 1979) (No. 77-1248); *Dunn* v. *Blumstein,* 405 U.S. 330 (1972); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966); *Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Wesberry* v. *Sanders,* 376 U.S. 1 (1964); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). *See also First National Bank* v. *Bellotti,* 435 U.S. 765 (1978); *Elrod* v. *Burns,* 427 U.S. 347 (1976); *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

The Framers of the Constitution never contemplated that Congress, much less the Attorney General, would establish or control electoral systems even for a "village alderman," *Oregon* v. *Mitchell,* 400 U.S. 112, 125 (1970).[78] Even more foreign to the Framers would have been the suggestion that local elections would be "frozen" by a federal veto of local election laws, especially in the absence of a constitutional violation. Nevertheless, the operation of Section 5 has had this result, and it flies in the face of recent rulings of this Court with respect to First Amendment freedoms. See *First National Bank* v. *Bellotti,* 435 U.S. at 780, 802; *Elrod* v. *Burns,* 427 U.S. at 373; *Buckley* v. *Valeo,* 424 U.S. at 48-49; *Rosario* v. *Rockefeller,* 410 U.S. 752, 766 (1973) (POWELL, J., dissenting).

[78] Section 5 applies to minor changes of minor political units. See Juris. State. at 14-15. The intention of Congress was that Section 5 be given the "broadest possible scope." Allen v. State Bd. of Elections, 393 U.S. at 567. This breadth constitutes, in the context of First Amendment freedoms, *overbreadth*. See Elrod v. Burns, 427 U.S. 347, 362-363 (1976); First Nat'l Bank v. Bellotti, 435 U.S. 765, 786 (1978). Section 5 fails in the requirement that it be "closely drawn to avoid unnecessary abridgement," Buckley v. Valeo, 424 U.S. 1, 25 (1976).

Bellotti recently affirmed the principle that: "Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause . . . ." 435 U.S. at 780. It requires no citation of authority to establish that due process requires application of objective standards and a hearing before property or liberty may be deprived. However, a review of the text of Section 5 reveals no provision for a hearing nor any standards by which the electoral system of the City of Rome is to be judged by the Attorney General. The Attorney General's regulations similarly do not provide for a hearing.

The "objection letter" of the Assistant Attorney General directed to the electoral changes of Rome, App. at 131, 139, typical of such letters, is conclusory only (albeit conclusory of an inability to conclude) and lacks any specific findings of fact or any indication of the sources of information on which the decision was based. The absence of any textual limitation upon the actions of the Attorney General, including the absence of a provision for a hearing, is aggravated by the unavailability of judicial review under *Morris* v. *Gressette,* 432 U.S. 491 (1977).[79] Section 5, an admittedly "severe" remedy, lacks in basic constitutional protections and denies Appellants Hamler and Hunter due process of law.

Appellants Hamler and Hunter, as a result of the freezing effect of Section 5, have been unable to vote, to express their political beliefs, to engage in political activities, to associate politically to advance ideas, to support candidates, to be candidates, and to defeat

[79] Indeed, the actions of the Attorney General are not even subject to discovery. See Juris. State. at 7a.

candidates. Many of these activities are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U.S. 97, 105 (1934). In Appellants' view these are First Amendment rights guaranteed by the Fifth Amendment against impairment; however, even if the rights of the citizens of Rome are not "fundamental," they should be deemed "penumbral" rights reserved to the people of Rome and similarly situated cities by the Ninth and Tenth Amendments. Appellants Hamler and Hunter argue that, aside from rights and powers their state and city may retain by virtue of principles of Federalism, they, as individuals, have suffered the loss of rights guaranteed by the First, Fifth, Ninth, and Tenth Amendments. Similar contentions were "accepted" by this Court in *United Public Workers* v. *Mitchell,* 330 U.S. 75, 94-95 (1947).

Appellants Hamler and Hunter share the indignity and frustration suffered by their City as a jurisdiction covered by the Act. They are directly affected by their inability to reap the benefits of local experimentation and improvements in government. They seek to have restored and protected their rights of political participation, not under the Fifteenth Amendment, but under the "other provisions" of the Constitution. This is especially appropriate where their government has been responsive and free of racial animus.

V. The Electoral Changes and Annexations Presently Before This Court Have Been Precleared by the Attorney General.

In light of the burden imposed upon covered jurisdictions by the declaratory judgment procedure of Section 5, Congress provided an administrative alterna-

tive, requiring the Attorney General to interpose an objection to submitted legislation within sixty days after receipt, or the matters submitted are deemed effective. *See Morris* v. *Gressette,* 432 U.S. 491, 495 (1977). This appeal presents two important issues relating to the function of the Attorney General under Section 5, the resolution of which are essential to its equitable administration.

A. Preclearance of the Georgia Municipal Election Code.

Beginning in 1966, the electoral changes presently before the Court were enacted by the Georgia General Assembly. See p. 11, *supra.* As indicated above, the General Assembly enacted, in 1968, the Georgia Municipal Election Code, (hereinafter cited as the "Municipal Code"), which applies to all municipal elections in Georgia. *Id.* The Municipal Code provided for the use of numbered posts, established a state-wide majority vote requirement, unless otherwise provided in a city's charter, and attendant run-off election procedures. The Attorney General of Georgia formally submitted the Municipal Code for preclearance. App. at 96-107. The Section 5 submission by Georgia clearly highlighted the Municipal Code's majority vote, run-off election, and numbered-post requirements. *Id.* at 100. More specifically, the submission stated that the majority vote requirement would apply if the city charter was then so "written" and that the "post" provision would apply if the city charter "calls for it." *Id.* Although the Justice Department objected to certain features of the Municipal Code, it expressed no reservations with respect to the majority vote, run-off

election, and numbered posts provisions, *id.* at 52-56,[80] and, therefore, this legislation was implemented.

In spite of preclearance of the Municipal Code, the Justice Department informed Rome officials, eight years later, that Rome's own numbered post, majority vote, and run-off election provisions, which are functionally identical to the state-wide provisions,[81] had not been precleared. This position was upheld by the court below.

The question before this Court is whether preclearance by the Justice Department of the 1968 Municipal Code constituted preclearance of the numbered post, majority vote, and run-off election provisions made as amendments to Rome's Charter, beginning in 1966. Three factors indicate that this question should be answered affirmatively.

First, the amendments to Rome's Charter enacted prior to 1968, dealing with numbered posts, majority vote and run-off elections, were affirmatively incorporated into the 1968 Municipal Code as a matter of positive law and thereby submitted to the Justice Depart-

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[80] The Justice Department, in responding to the submission by Georgia, objected to the use of various features of the 1968 Georgia Municipal Election Code in certain jurisdictions. Moreover, it requested the names of the cities to which certain provisions would apply. However, with respect to the majority vote, run-off elections, and numbered posts, no such reservation or request was made. App. at 52-56.

[81] *Compare* Juris. State. at 1e-27e *with* Juris. State. 1d-3d. Since, in Georgia, the state legislature, and not municipalities, is vested with the authority to regulate municipal elections, no subsequent action on the part of municipalities is required to effectuate numbered posts, majority vote, and run-off elections. *See* GEORGIA CODE ANN. §§ 69-309 to 69-310 (1976 & Cum. Supp. 1979).

ment. The relevant provisions of the Municipal Code unambiguously provide that existing numbered post, majority vote, and run-off election provisions govern the conduct of municipal elections. Juris. State. at 1d-3d. With respect to such provisions enacted prior to 1968, the Municipal Code makes them law.

An analogous issue, the effect of preclearance of state-wide electoral changes on county elections in Georgia, was determined in *United States* v. *Georgia*, No. C76-1531A (N.D. Ga., Sept. 30, 1977), *aff'd. mem.* 98 S.Ct. 2840 (1978), dealing with the Georgia Election Code of 1964 (the "State Code"). This statute, *Ga. Code Ann.* § 34-102 (1970), governs federal, state, county, but not municipal elections; and it also contains numbered post, majority vote, and run-off elections provisions. *Ga. Code Ann.* §§ 34-1015, 34-1513 (1970).[82] In that case, the court rejected the United States' petition that the implementation of the numbered post, majority vote, and run-off election requirements, in primaries and elections for county governing

[82] In that case, the United States asserted, with respect to the 1964 Georgia Election Code, that the Attorney General did not give specific attention to the numbered posts and majority vote features of that Code. The three-judge court in the United States District Court for the Northern District of Georgia held that the 1964 Georgia Election Code was properly presented to the Attorney General, and the majority vote and numbered posts provisions were, in fact, precleared. This Court summarily affirmed. Thus, county governments in Georgia are authorized to utilize these common electoral features. The court below has thus created the following anomaly: while counties and the State may utilize numbered posts and majority vote provisions, Georgia cities cannot use identical features because the State of Georgia allegedly did not submit " 'in an unambiguous and recordable manner' *all* municipal charter provisions," Juris. State. at 25b (emphasis added).

bodies, be enjoined. The court held that preclearance by the Attorney General, beginning in 1968, of the State Code constituted preclearance of all provisions contained therein, including those relating to county elections. See Jurisdictional Statement of the United States in United States v. Georgia, No. C76-1531A (N.D. Ga., Sept. 30, 1977), *aff'd. mem.*, 98 S.Ct. 2840 (1978).

Second, in light of the fact that the Municipal Code affects only municipalities, its preclearance by the Attorney General is pointless unless all of the local electoral provisions which it enacts are deemed to be precleared.

Third, if covered jurisdictions are to rely upon preclearance as a rapid and efficient means of implementing their laws, the Attorney General must be bound to respect prior Justice Department determinations. Although the Justice Department may alter its enforcement policies, such alterations should be only prospective. Rome officials reasonably assumed that numbered post, majority vote, and run-off election provisions, as electoral mechanisms, were precleared upon approval of the Municipal Code, and that the Municipal Code could be relied upon. Indeed, Rome did rely upon the Code, see Juris. State. at 23e, in at least four elections. See p. 15, *supra*. For these reasons the majority vote, run-off election, and numbered post provisions of Rome should be deemed precleared by virtue of preclearance of the Municipal Code.

B. Failure by the Attorney General to Object in a Timely Manner.

During the preclearance process, Rome moved, on May 24, 1976, for reconsideration of the Attorney General's previous objection to its electoral changes and

annexations. This motion was acknowledged by the Attorney General. On July 14, 1976, before the Attorney General had responded, and without solicitation, the City supplemented its request with two affidavits which the court below recognized were "brief . . . [and] hardly of a nature to impose a significant burden on the Attorney General," see Juris. State. at 28b, n.64. The affidavits were not acknowledged. The Attorney General did not respond until August 12, 1976.

Regulations governing preclearance pursuant to Section 5, as approved by this Court in *Georgia* v. *United States,* 411 U.S. 526 (1973), provided that if the Attorney General objects to a submission, the submitting authority may seek reconsideration, and the Attorney General must decide within sixty days of receipt of a request for reconsideration whether to withdraw or continue his objection, provided that he has at least fifteen days to object following a conference held at the submitting authority's request. 28 C.F.R. §§ 51.3 (d), 51.10(a), 51.18(a), and 51.24 (1978). There is no provision in the regulations providing that the sixty-day period in which the Attorney General must respond to a request for reconsideration is tolled by voluntary supplementation of a submission. To the contrary, Sections 51.3(d) and 51.24, which make a conference held at a submitting authority's request the sole condition for an extension of the sixty-day period, strongly suggest that if additional conditions for extending the period had been contemplated, they would appear in the regulations.

Rome contended below that the statutory sixty-day period began on May 24, 1976, the date of the initial request for reconsideration, and that the Attorney

General, having failed to respond within the required time, precleared the changes. Appellees contended that the period began on July 14, 1976, and that the response was thus timely. The District Court found that the relevant period "commence[s] anew" when the Attorney General receives an unsolicited supplement to a submission. See Juris. State. at 28b. This holding is contrary to the Attorney General's own regulations, 28 C.F.R. §§ 51.3, 51.10(a) and 51.18 (1978).

It is clear that all submissions by Rome were complete as of the receipt by the Justice Department of the request for reconsideration on May 24, 1976. This is established by virtue of the Attorney General's letter of acknowledgement of May 25, 1976. The letter states that thirteen annexations and the electoral changes were still under consideration, and the record is clear that no determination of inadequacy or further requests for information were made by the Attorney General. The letter did not advise Rome that the sixty-day period was tolled pursuant to § 51.18. App. at 154-156. The voluntary submission of two supplementary affidavits by Rome did not, under the regulations, toll the sixty-day time period. *See also* 28 C.F.R. § 51.3(d). Neither Section 5 of the Act, nor the Attorney General's regulations, permit such an extension of the sixty-day period for response to a request for reconsideration.

No significant policy of the Act is served by extending the sixty-day period as the court below has done. Presumably, information, such as that contained in Rome's supplementation, is not required by the Attorney General in order to decide upon a request for reconsideration, or he would have requested it. The submitting authority's interests clearly lie in providing

such information as quickly as possible in order to insure that it will be considered by the Attorney General in his decision-making process. Careful consideration of the purpose of the preclearance mechanism argues for strict adherence by the Attorney General to the regulations governing the time period in which he must respond to requests for reconsideration. Any other course would undermine the congressional objective of providing a rapid method of reviewing legislation from covered jurisdictions.

Under *Georgia* v. *United States*, the Attorney General is allowed to object "by simply saying that he cannot make up his mind." *Id.* at 545. However, Appellants believe that he must object within sixty days, rather than eighty.

CONCLUSION

The judgments of the District Court, dismissing Appellants' case and granting Appellees' motions for summary judgment, should be reversed. In order that complete relief might be obtained, Appellants pray that Rome be exempted from the Act or that Section 5 of the Act be declared unconstitutional. Such a holding is necessary, Appellants submit, in order that Rome and other jurisdictions innocent of purposeful discrimination might function effectively in the Federal system, free of the burdens of Section 5. In the absence of either such holding, Appellants pray that the electoral changes and annexations at issue be declared to be effective.

Respectfully submitted,

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APPENDIX

APPENDIX A

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

ARTICLE IV

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X [1791]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the

United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV [1870]

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

APPENDIX B

PROCEDURES FOR THE ADMINISTRATION OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, 28 C.F.R. PART 51 (1978)

Subpart A—General Provisions

§ 51.1 Purpose.

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, prohibits the enforcement in any jurisdiction covered by section 4(a) of the Act, 42 U.S.C. 1973b, of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until the authority proposing enforcement either (a) obtains from the U.S. District Court for the District of Columbia a declaratory judgment that the plan does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or (b) the plan has been submitted to the Attorney General and he has interposed no objection within a 60-day period following submission. In order to carry out his responsibilities under this section of the Voting Rights Act and to make clear his interpretation of the responsibilities imposed on other individuals and entities thereunder, the procedures in this part shall govern the administration of section 5.

§ 51.2 Definitions.

(a) The terms "vote" and "voting" are used herein as defined in the Voting Rights Act of 1965, to include all action necessary to make a vote effective in any primary, special, or general election, including but not limited to, registration, listing pursuant to the Voting Rights Act of 1965, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with

respect to candidates for public or party office and propositions for which votes are received in an election.

(b) The term "change affecting voting," as used herein, shall mean any voting qualification, prerequisite to voting, standard, practice, or procedure different from that in force or effect on the date used to determine coverage by section 4(a) (November 1, 1964 or November 1, 1968, as the case may be) and shall include, but not be limited to, the examples given in § 51.4(c).

(c) The term "submission" as used herein shall mean presentation to the Attorney General by an appropriate official of any change affecting voting and an explanation of the difference between the change and the existing law or practice and such appropriate supporting materials as are included to demonstrate that the voting qualification, prerequisite to voting, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

(d) "Attorney General" shall mean the Attorney General of the United States or his delegate.

(e) The term "submitting authority" shall mean the party responsible for submitting a voting change on behalf of a State or political subdivision under § 51.8 or any other person or persons empowered to represent or act on behalf of a State or political subdivision with respect to a submission under section 5.

§ 51.3 Computation of time.

(a) The Attorney General shall have 60 days in which to interpose an objection to a submitted change affecting voting.

(b) The 60-day period shall commence upon receipt by the Department of Justice of a submission from an appropriate official, which submission satisfies the requirements

of § 51.10(a). Procedures for requesting additional material and for determining the commencement of the 60-day period when a submission is inadequate are described in § 51.18.

(c) The 60-day period shall mean 60 calendar days, provided that if the final day of the period should fall on a Saturday, Sunday, or national holiday the Attorney General shall have until the close of the next full business day in which to interpose an objection. The date of the Attorney General's response shall be the date on which it is mailed to the submitting authority.

(d) When the Attorney General objects to a submitted change affecting voting, and the submitting authority seeking reconsideration of the objection brings additional information to the attention of the Attorney General, the Attorney General shall decide within 60 days of receipt of a request for reconsideration (provided that he shall have at least 15 days following a conference held at the submitting authority's request) whether to withdraw or to continue his objection.

§ 51.4 Requirement of action for declaratory judgment or submission to Attorney General.

Section 5 requires that, prior to enforcement of any change affecting voting, the State or political subdivision which has enacted or seeks to administer the change affecting voting must obtain either a judicial or an executive determination that denial or abridgment of the right to vote on account of race or color is not the purpose and will not be the effect of the change. It is illegal to enforce a change affecting voting without complying with section 5. The obligation to obtain such judicial or executive review is not relieved by illegal enforcement.

The Attorney General may bring suit or take other appropriate action to prevent or redress any denial of the right to vote on account of race or color. See 42 U.S.C. 1973j.

(a) All changes affecting voting, even though the change appears to be minor or indirect, to expand voting rights or to remove the elements which caused objection by the Attorney General to a prior submission, must either be submitted to the Attorney General or be made the subject to an action for declaratory judgment in the U.S. District Court for the District of Columbia.

(b) A submission to the Attorney General does not affect the right of the submitting authority to bring a suit in the U.S. District Court for the District of Columbia at any time, seeking a declaratory judgment that the change affecting voting does not have a racially discriminatory purpose or effect.

(c) Legislation and administrative actions constituting changes affecting voting covered by section 5 include, but are not limited to, the following examples:

(1) Any change in qualifications or eligibility for voting;

(2) Any change in procedures concerning registration, balloting, or informing or assisting citizens to register and vote;

(3) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, or reapportionment), the location of a polling place, change to at-large elections from district elections or to district elections from at-large elections;

(4) Any alteration affecting the eligibility of persons to become or remain candidates or obtain a position on the ballot in primary or general elections or to become or remain officeholders or affecting the necessity of or methods for offering issues and propositions for approval by voting in an election;

(5) Any change in the eligibility and qualification procedures for independent candidates;

(6) Any action extending or shortening the term of an official or changing the method of selecting an official (e.g. a change from election to appointment);

(7) Any alteration in methods of counting votes.

Subpart B—Procedures for Submission to the Attorney General

§ 51.5 Form of submissions.

Submissions may be made in letter or any other written form, as long as the change affecting voting that is being submitted is clearly set forth in compliance with § 51.10(a) and the name and title of the individual and the State or political subdivision which he represents are disclosed. Submissions should be made in duplicate.

§ 51.6 Time of submissions.

Changes affecting voting should be submitted as soon as possible after the enactment or administrative decision is made and are required by law to be submitted prior to enforcement.

§ 51.7 Premature submissions returned.

The Attorney General will return without decision on the merits any proposal for a change affecting voting which has been submitted prior to final enactment or final administrative decision, provided that regarding a change as to which approval by referendum or by a court is required (e.g., an amendment to a State constitution or a reapportionment plan), the Attorney General may consider and issue a decision concerning the change prior to the referendum or the action of the court if all other action necessary for adoption has been taken.

§ 51.8 Party responsible for submitting.

Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the State or

political subdivision in which the change is proposed to be effective. When one or more counties within a State will be affected, the State may submit a change affecting voting on behalf of the covered county or counties.

§ 51.9 Address for submissions.

Changes affecting voting shall be delivered or mailed to: Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. The envelope and first page of any submission shall be clearly marked: Submission under section 5, Voting Rights Act.

§ 51.10 Contents of submissions.

(a) Each submission shall include:

(1) A copy of any legislative or administrative enactment or order embodying a change affecting voting, certified by an appropriate officer of the submitting authority to be a true copy.

(2) The date of final adoption of the change affecting voting.

(3) Identification of the authority responsible for the change and the mode of decision (e.g., act of State legislature, ordinance of city council, redistricting by election officials).

(4) An explanation of the difference between the submitted change affecting voting and the existing law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting. When the change will affect less than the whole State or subdivision, such explanation should include a description of which subdivisions or parts thereof will be affected and how each will be affected.

(5) A statement certifying that the change affecting voting has not yet been enforced or administered, or an explanation of why such a statement cannot be made.

(6) With respect to redistricting, annexation, and other complex changes, other information which the Attorney General determines is required to enable him to evaluate the purpose or effect of the change. Such other information may include items listed under paragraph (b) of this section. When such other information is required, the Attorney General shall notify the submitting authority in the manner provided in § 51.18(a).

(b) In addition to the requirements listed in paragraph (a) of this section, each submission may include appropriate supporting materials to assist the Attorney General in his consideration. The Attorney General strongly urges the submitting authority to include the following information insofar as it is available and relevant to the specific change submitted for consideration:

(1) A statement of the reasons for the change affecting voting.

(2) A statement of the anticipated effect of the change affecting voting.

(3) A statement identifying any past or pending litigation concerning the change affecting voting or related prior voting practices.

(4) A copy of any other changes in law or administration relating to the subject matter of the submitted change affecting voting which have been put into effect since the time when coverage under section 4 of the Voting Rights Act began and the reasons for such prior changes. If such changes have already been submitted the submitting authority may refer to the date of prior submission and identify the previously submitted changes.

(5) Where any change is made that revises the constituency which elects any office or affects the boundaries of any geographic unit or units defined or employed for voting purposes (e.g., redistricting, annexation, change from district to at-large elections) or changes the location of a polling place or place of registration, a map of the area to be affected showing the following:

(i) The existing boundaries of the voting unit or units sought to be changed.

(ii) The boundaries of the voting unit or units sought by the change.

(iii) Any other changes in the voting unit boundaries or in the geographical makeup of the constituency since the time that coverage under section 4 began. If such changes have already been submitted the submitting authority may refer to the date of the prior submission and identify the previously submitted changes.

(iv) Population distribution by race within the existing units.

(v) Population distribution by race within the proposed units.

(vi) Any natural boundaries or geographical features which influenced the selection of boundaries of any unit defined or proposed for the new voting units.

(vii) Location of polling places.

(6) Population information: (i) Population before and after the change, by race, of the area or areas to be affected by the change. If such information is contained in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(ii) Voting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change. If such information is contained

in the publications of the U.S. Bureau of the Census, a statement to that effect may be included.

(iii) Copies of any population estimates, by race, made in connection with adoption of the proposed change, preparation of the submission or in support thereof and the basis for such estimates.

(iv) Where a particular office or particular offices are involved, a history of the number of candidates, by race, who have run for such office in the last two elections and the results of such elections.

(7) Evidence of public notice or opportunity for the public to be heard. In examining submissions, consideration may be given, where appropriate, to evidence of public notice and opportunity for interested parties to participate in the decision to adopt or implement the proposed change and to indications that such participation in fact took place, or to evidence of notice to the public that a submission has been made soliciting comment by the public to the Department of Justice. Examples of materials demonstrating public notice or participation include:

(i) Copies of newspaper articles discussing the proposed change.

(ii) Copies of public notices (and statements regarding where they appeared, e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups) which describe the proposed change and invite public comment or participation in hearings, or which announce submission to the Attorney General and invite comments for his consideration.

(iii) Minutes or accounts of public hearings concerning the proposed changes.

(iv) Statements, speeches, and other public communications concerning the proposed changes.

(v) Copies of comments from the general public.

(vi) Excerpts from legislative journals containing discussion of a submitted enactment, or other materials revealing its legislative purpose.

(8) Where information requested herein is relevant but not known and not believed to be available, submissions should so state.

(9) Where information furnished reflects an estimation, submissions should identify the individual and state his qualifications to make the estimate.

(10) Submissions should identify in general the source of any information they supply.

(11) When a submitting authority desires the Attorney General to consider any information which has been supplied in connection with an earlier submission, incorporation by reference may be accomplished by stating the date and subject matter of the earlier submission and identifying the relevant information therein.

§ 51.11 Request for notification concerning voting litigation.

When a State or political subdivision subject to section 5 becomes involved in any litigation concerning voting, it is requested that prompt notification be sent to the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. Such notification will not be considered to be a submission under section 5.

Subpart C—Communications From Individuals or Groups

§ 51.12 Communications concerning voting changes.

Any individual or group may send to the Attorney General information concerning a change affecting voting in an area to which section 5 of the Voting Rights Act applies.

(a) Communication may be in the form of a letter stating the name and address of the individual or group, describing the alleged change affecting voting and setting forth evidence regarding whether the change has or does not have a discriminatory purpose or effect or simply stating a desire that the change be called to the attention of the Attorney General. Two copies of each communication should be mailed to the Assistant Attorney General, Civil Rights Division, Department of Justice, Washington, D.C. 20530. The envelope and the first page of each communication should be marked: Comment, section 5, Voting Rights Act.

(b) Comments by individuals or groups concerning any change affecting voting may be submitted at any time; however, they should be submitted as soon as possible after the change affecting voting is brought to the attention of the individual or group.

(c) Department of Justice officials and employees shall comply with the request of any individual that his identity not be disclosed to any person outside the Department. In addition, whenever it appears to the Attorney General that disclosure of the identity of an individual who provided information regarding a change affecting voting could jeopardize the personal safety, employment, or economic standing of the individual, the identity of the individual shall not be disclosed to any person outside the Department of Justice.

(d) When an individual or group desires the Attorney General to consider information which has been supplied in connection with an earlier submission, incorporation by reference may be accomplished by identifying the earlier submission by date and subject matter and identifying the relevant information or related communication.

§ 51.13 Establishment and maintenance of registry of interested individuals and groups.

The Attorney General shall establish and maintain a Registry of Interested Individuals and Groups. Such registry shall contain the name, address, and telephone number of any individual or group that requests inclusion therein for purposes of receiving notice of section 5 submissions. Each registrant shall specify the area of areas with respect to which notification is requested.

§ 51.14 Communications concerning voting suits.

Individuals and groups are urged to notify the Assistant Attorney General, Civil Rights Division, of litigation concerning voting in areas subject to section 5.

§ 51.15 Action on communications from individuals or groups.

(a) If the person or entity responsible for submitting the change affecting voting has submitted the change to the Attorney General, any evidence from individuals or groups shall be considered along with the materials submitted and materials resulting from any investigation.

(b) If no submission (as defined in § 51.2(c)) has been made, the Attorney General shall advise the person or entity responsible for the alleged change of the duty to seek a declaratory judgment or to make a submission to the Attorney General before enforcement.

(c) Where no submission has been made and no declaratory judgment has been sought and a change affecting voting is enforced or is about to be enforced in a covered jurisdiction, the Attorney General may bring suit or take other appropriate action to enforce compliance with section 5 and to prevent or redress any denial or abridgment of the right to vote on account of race or color. See 42 U.S.C. 1973j.

Subpart D—Processing of Submissions

§ 51.16 Notice to registrants concerning submission.

When the Attorney General receives a section 5 submission, prompt notice thereof shall be given to the individuals and groups who have registered for this purpose in accordance with § 51.13. Such notice shall be sent to each such registrant who has requested notification concerning the area or areas affected by the submitted change.

§ 51.17 Return of inappropriate submissions.

The only changes authorized by section 5 to be submitted to and passed upon by the Attorney General are those affecting voting rights. The Attorney General shall therefore examine and make a response on the merits to only those submissions affecting voting. All others shall be returned to the submitting party without comment on their merits.

§ 51.18 Obtaining information regarding submissions.

(a) If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission.

(b) After receipt of a submission which satisfies the requirements of § 51.10(a), the Attorney General may at any time during the 60-day period:

(1) Request additional information from the submitting authority,

(2) Request information from other local authorities or interested individuals or groups,

(3) Conduct such investigation or inquiry as he deems appropriate.

(c) If the submission does not contain adequate evidence of notice to the public, and the Attorney General believes that racial purpose or effect is possible, he may take steps to provide public notice sufficient to invite interested citizens to provide evidence as to the presence or absence of racially discriminatory purpose or effect. The authority responsible for the submission shall be advised when any such steps are taken by the Attorney General.

§ 51.19 Standard for decision concerning submissions.

Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority.

§ 51.20 Notification of decision not to object.

(a) If the Attorney General decides to interpose no objection to a submitted change affecting voting, the submitting authority shall be notified to that effect.

(b) The notification shall state that the failure of the Attorney General to object does not bar subsequent litigation to enjoin enforcement of the change.

(c) A copy of the notification shall be sent to any party who has commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.21 Notification of decision to object.

(a) When the Attorney General decides to interpose an objection, the submitting authority shall be notified within the 60-day period allowed. The reasons for the decision shall be stated.

(b) The submitting authority shall be advised that the Attorney General will reconsider his objection upon a request by the submitting authority within 10 days of such objection, for an opportunity to present further substantiating or explanatory information which was not previously available to the submitting authority. In appropriate cases, the Attorney General may request that local public notice of the request for reconsideration be given by the submitting authority.

(c) The submitting authority shall be advised further that it may request a conference with a representative of the Department of Justice to reconsider an objection when such new information has become available.

(d) A copy of the notification shall be sent to any party that has commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.22 Expedited consideration.

When a submitting authority demonstrates good cause for special expedited consideration to permit enforcement of a change affecting voting within the 60-day period following submission (good cause will, in general, only be found to exist with respect to changes made necessary by circumstances beyond the control of the enacting or submitting authorities), the Attorney General may consider the submission on an expedited basis. Prompt notice of the request for expedited consideration will be given to interested parties registered in accordance with § 51.13. When a decision not to object is made within the 60-day period following receipt of a submission which satisfies the requirements of § 51.10(a), the Attorney General may reexamine the submission if additional information comes to his attention during the remainder of the 60-day period which would require objection in accordance with § 51.19.

§ 51.23 Reconsideration on request.

(a) If a submitting authority requests a conference to produce information not previously available to it in support of reconsideration of an objection by the Attorney General, a meeting shall be held at a location determined by the Attorney General.

(b) When a submitting authority requests that a conference be held concerning a change affecting voting to which the Attorney General has objected, individuals or groups that commented on the change prior to the Attorney General's objection or that seek to participate in response to any public or other notice of a request for reconsideration shall be notified and given the opportunity to confer.

(c) Such a conference shall be conducted by the Assistant Attorney General, Civil Rights Division, or his designee in an informal manner. Those present will be permitted to present facts in support of their positions.

(d) The Assistant Attorney General or the person he has designated to conduct the conference may, in his discretion, choose to hold separate meetings to confer with the submitting authority and interested groups or individuals.

§ 51.24 Decision after reconsideration.

An objection shall be withdrawn if the submitting authority can produce information not previously available to it which satisfies the Attorney General that the change does not have a racially discriminatory purpose or effect. The Attorney General shall notify the submitting authority within 60 days of the request for reconsideration (provided that the Attorney General shall have at least 15 days following any conference that is held in which to decide) of his decision to continue or withdraw an objection, giving the reasons for his decision. A copy of the notification shall be sent to any party that has commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.25 Withdrawal of objection.

Where there has been a substantial change in fact or law, the Attorney General may, if he deems it appropriate, withdraw an objection on his own motion if he determines that the objection is not in accord with the standard for decision in § 51.19. Notification of the withdrawal of an objection shall be sent to the submitting authority and to any party that commented on the submission or has requested notice of the Attorney General's action thereon.

§ 51.26 Records concerning submissions.

(a) Section 5 files: The Attorney General shall maintain a section 5 file for each submission, containing the submission, related written materials, correspondence notations concerning conferences with the submitting authority

or any interested individual or group and a copy of any letters from the Attorney General concerning his decision whether to object to a submission. Communications from individuals who have requested confidentiality or with respect to whom the Attorney General has determined that confidentiality is appropriate under § 51.12(c) shall not be included in the section 5 file. Investigative reports and internal memoranda shall not be included in the section 5 file.

(b) Chronological file: Brief summaries regarding each submission and the Department of Justice investigation and decision concerning it will be prepared when the decision whether to interpose an objection has been made. A chronological file of these summaries, arranged by the date upon which such decision is made will be maintained.

(c) The contents of the above-described section 5 and chronological files will be available for inspection and copying by the public during normal business hours at the Civil Rights Division, Department of Justice, Washington, D.C. Consistent with the Department of Justice regulation implementing the Public Information Section of the Administrative Procedure Act, 28 CFR 16.4, the fees for copying the contents of these files will be 50 cents for the first page and 25 cents for each additional page.

(d) The Attorney General may, at his discretion, call to the attention of the submitting authority or an interested individual or group information or comments related to a submission.

Subpart E—Petition To Change Procedures

§ 51.27 Petitioning party.

Any interested individual or group may petition to have these procedures amended by new provisions.

§ 51.28 Form of petition.

A petition under this subpart may be made by informal letter and shall state the name and address of the petitioner, the change requested and the reasons for requesting the change.

§ 51.29 Disposition of petition.

The Attorney General will consider a petition under this section and make a disposition thereof. Prompt notice, accompanied by a simple statement of the reasons, shall be given to the petitioner if the petition is denied in whole or in part.

APPENDIX C

[Not in Record of Proceedings Below]

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

August 3, 1979

Address Reply to the Division Indicated
and Refer to Initials and Number
DSD:JMC:JAS:gml
DJ 166-012-3

Mr. Joseph W. Dorn
2033 K. Street, N.W.
Suite 400
Washington, D.C. 20006

Dear Mr. Dorn:

This is in response to your request for statistics with respect to the administration of Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. The requested statistics are as follows:

Number of voting changes submitted to the Attorney General, 1965-June 30, 1979	25,964
Number of objections interposed by The Attorney General, 1965-June 30, 1979	347
Number of voting changes submitted to the Attorney General, January 1-June 30, 1979	3,258
Number of objections interposed by the Attorney General, January 1-June 30, 1979	7

If we can be of further assistance, please let us know.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

By: DAVID H. HUNTER
Attorney
Voting Section

Supreme Court, U.S.
FILED
SEP 21 1979
MICHAEL RODAK, JR., CLERK

No. 78-1840

In the Supreme Court of the United States

OCTOBER TERM, 1978

CITY OF ROME, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1840

CITY OF ROME, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

OPINIONS BELOW

The district court's opinion of February 22, 1978, reproduced at J.S. App. 1a-15a, is reported at 450 F. Supp. 378.[1] The court's order of April 4, 1979, is reproduced at J.S. App. 1b-2b. The court's opinion of April 9, 1979, reproduced at J.S. App. 3b-59b, is reported at 472 F. Supp. 221.

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[1] "J.S. App." refers to the appendix to the Jurisdictional Statement. "A." refers to the separately bound appendix to the briefs filed in this Court.

JURISDICTION

The orders of the three-judge court, convened pursuant to 42 U.S.C. 1973b(a) and 1973c, were entered on February 22, 1978 (J.S. App. 1a) and April 4, 1979 (*id.* at 1b). Notice of appeal was filed on May 2, 1979 (*id.* at 1f), and the jurisdictional statement was filed on June 7, 1979. This Court noted probable jurisdiction on July 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973b(a) and 1973c.

QUESTIONS PRESENTED

1. Whether the district court erred in holding that Section 5 of the Voting Rights Act of 1965 permits only those electoral changes that do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and in concluding that the changes at issue would have a discriminatory effect.

2. Whether the district court erred in holding that Section 4(a) of the Voting Rights Act of 1965 does not permit a municipality in a state covered by Sections 4(a) and 5 to file an independent action to exempt itself from coverage of the Act.

3. Whether this Court should overrule its prior decisions holding that Section 5 of the Voting Rights Act, which requires federal preclearance of new voting procedures enacted by certain jurisdictions, is a proper exercise of Congress' power to enforce the guarantees of the Fifteenth Amendment.

4. Whether the district court erred in concluding that the electoral changes and annexations at issue here have not been precleared by the Attorney General.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifteenth Amendment to the United States Constitution provides as follows:

> Section 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

2. Sections 4 and 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973b and 42 U.S.C. 1973c, are reproduced at J.S. App. 1c-9c.

3. The changed electoral procedures in the Charter of the City of Rome at issue here—1966 Ga. Laws 2375-2378, 2382-2386, 2815-2819, 3083-3087; 1967 Ga. Laws 3296-3298; 1970 Ga. Laws 2563-2566; 1971 Ga. Laws 3664-3666—are reproduced at J.S. App. 1e-27e.

4. Other provisions of the Georgia Municipal Election Code, which were precleared by the Attorney General—Ga. Code Ann. § 34A-102 (1970); Ga. Code Ann. § 34A-902 (1970); Ga. Code Ann. § 34A-1407 (1978)—are reproduced at J.S. App. 1d-3d.

STATEMENT

A. Electoral Practices in the City of Rome

In 1970, the City of Rome, located in Floyd County, Georgia, had a population of 30,759, and its racial composition was 76.6% white and 23.4% black (J.S. App. 4b). The City elects its City Commission and Board of Education, and in 1975 blacks comprised about 15.5% of the registered voters (*ibid.*). There has never been a black elected to any political office in the City, and only four black persons have ever sought elective office (*id.* at 8b).[2]

From 1929 until 1966, Rome's City Charter established a nine-member City Commission, with each member elected from one of nine wards in the City (J.S. App. 4b). Elections were at-large and the winner needed only a plurality vote (*ibid.*). The charter also provided for a Board of Education consisting of five members elected concurrently and at large (*ibid.*).

In 1966 the General Assembly of Georgia enacted several laws of local application changing portions of

[2] Two of these—M.D. Whatley and Dr. John W. Houser, Jr. —ran unsuccessfully for the Board of Education in the 1950's and early 1960's, respectively; neither did well (J.S. App. 8b). The third, Samuel Stubbs, received only 79 out of 276 votes in his campaign in the 1972 Republican primary election for City Commission (*ibid.*). The fourth candidate was the Rev. Clyde Hill, who obtained a plurality of the votes in his quest for a seat on the Board of Education in 1970, but who lost the subsequent run-off election required by the 1966 amendments to the City's charter that are at issue in this case (*id.* at 9b).

the Rome charter relating to the election of the City Commission and Board of Education (J.S. App. 4b-5b).[3] Those laws changed the election of the City Commission as follows:

(a) the number of wards was reduced from nine to three (*id.* at 1e-4e);

(b) each of the nine commissioners was to be elected from one of the three numbered posts established within each ward (*id.* at 2e);

(c) the election of each commissioner was to be by majority vote; in the event that no candidate received a majority, a run-off would be held between the two candidates receiving the highest number of votes (*ibid.*); and

(d) the terms of the three commissioners from each ward would be staggered (*ibid.*).

The 1966 charter amendments changed the method of electing the Board of Education as follows:

(a) the Board was expanded from five to six members (*id.* at 10e);

(b) each member of the Board was to be elected at-large, by majority vote, for one of two numbered posts in one of the three wards, with run-off procedures identical to those passed for City Commission elections (*id.* at 10e-11e);

[3] While cities in Georgia have some home rule powers, changes in the electoral process can be made only by the state legislature. Thus, the charter changes at issue in the present case are laws of the State of Georgia. Ga. Code Ann. § 69-1018 (1976).

(c) each member of the Board was required to reside in the ward from which he or she was elected (*id.* at 10e); and

(d) the terms of the two members from each ward were staggered (*id.* at 11e).

In addition to these changes in the manner of electing the City Commission and the Board of Education, the City annexed 60 different areas between November 1, 1964, and February 10, 1975 (*id.* at 5b).

In 1968 the Georgia legislature enacted a comprehensive Municipal Election Code that permitted municipalities to continue to use majority voting with run-off elections and numbered posts where their local charters already contained such provisions (J.S. App. 23b-24b). This code was submitted to the Attorney General as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c,[4] and

[4] The criteria for determining whether a state or political subdivision thereof is required to submit electoral changes to the Attorney General for preclearance under Section 5 are identified in Section 4(b) of the Act, 42 U.S.C. 1973b(b), which is applicable to any State or any political subdivision of a State which—

> * * * (1) the Attorney General determines maintained on November 1, 1964, any test or device [designed to condition registration or voting on literacy, education, moral character, or approval of other persons], and with respect to which (2) the Director of Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

The State of Georgia was designated a covered jurisdiction under this provision in 1965 (30 Fed. Reg. 9897), and by virtue of that designation, its municipalities—including the City of Rome—are obligated to comply with the preclearance requirements of Section 5 (J.S. App. 13b-14b n.43).

he precleared it (J.S. App. 23b). However, the specific electoral changes made two years earlier in the Rome City Charter were not submitted for preclearance prior to their implementation, and did not come to the Attorney General's attention until 1975 (A. 126-138).

The first, and thus far the only, black candidate to seek office in Rome following implementation of the 1966 charter amendments was the Rev. Clyde Hill, who ran for a position on the Board of Education in 1970 (J.S. App. 9b). Rev. Hill conducted a strong campaign against three white opponents and received a plurality of the votes cast in the general election (*ibid.*; A. 77). But under the 1966 changes he was required to enter a run-off election because he had not received a majority of the votes, and in the run-off he was defeated (J.S. App. 9b; A. 79).[5]

[5] In the 1970 general election for school board representative from Ward 2, Post 2, the following numbers of ballots were cast (A. 77):

Rev. Clyde Hill, Sr.	921
Dr. Sara L. Hoyt	909
Jean V. Anderson	407
Rev. Warren L. Jones	143
TOTAL	2380

In the run-off election between Rev. Hill and Dr. Hoyt, a total of 2,551 ballots was cast; Rev. Hill received 1142 votes, and Dr. Hoyt received 1409 votes (A. 79).

On the basis of Rev. Hill's experience, members of the City's black community have concluded that it is impossible for a black candidate to be elected under the majority vote requirement now in effect (J.S. App. 9b-10b & nn.32-33).[6] Widespread black apathy resulted (*id.* at 9b),[7] and qualified blacks will not run for office because they believe they cannot obtain the necessary majority to be elected, given the existence of racial bloc voting in Rome (*id.* at 10b & n.34).[8]

While conclusive statistical proof of racial bloc voting in Rome is unavailable (J.S. App. 10b-11b n.36; A. 366-373 (Deposition of Dr. James W. Loewen)), the general belief among black voters is that, given a choice, voters in Rome will cast their ballots

[6] See also A. 254 (Deposition of C.W. Aycock); A. 323, 326-327 (Deposition of Curtis Moreland); A. 337 (Deposition of E.J. Thomas, Jr.); A. 342 (Deposition of Napoleon Fielder); A. 348 (Deposition of Rev. Clyde Hill).

[7] See also A. 254, 258 (Deposition of C.W. Aycock); A. 274 (Deposition of Donald Jackson); A. 293, 303 (Deposition of Joe Wright); A. 309 (Deposition of James Wright); A. 325-326 (Deposition of Curtis Moreland); A. 337 (Deposition of E.J. Thomas, Jr.); A. 342 (Deposition of Napoleon Fielder); A. 347 (Deposition of Rev. Clyde Hill); and A. 353 (Deposition of Elgin Carmichael).

[8] See also A. 249-255 (Deposition of C.W. Aycock); A. 283 (Deposition of Donald Jackson); A. 298 (Deposition of Joe Wright); A. 330-331 (Deposition of Curtis Moreland); A. 332-333 (Deposition of E.J. Thomas, Jr.); A. 352-353 (Deposition of Elgin Carmichael).

for candidates of their own race (*id.* at 11b n.37).[9] Supporting that perception are the election statistics from Rev. Hill's 1970 school board campaign. After gaining a plurality in the general election (A. 77), Rev. Hill received only 221 additional votes in the run-off, while his white opponent gained an additional 500 votes (A. 79). Given the additional fact that 171 more votes were cast in the run-off than in the general election, the likely inference is that bloc voting by the white community caused Rev. Hill's defeat (J.S. App. 12b).

Dr. James W. Loewen, a professor of sociology who testified as an expert witness for the United States, provided further evidence of racial bloc voting in Rome and surrounding Floyd County. Dr. Loewen analyzed election data for the 1968 Democratic primary race for the United States Senate and concluded that in that election at least 88.9% of the white voters in Floyd County voted for the white incumbent, Herman Talmadge, while at least 76.2% of the county's black voters cast their ballots for the black candidate, Maynard Jackson (J.S. App. 12b; A. 355-364). Dr. Loewen stated he was confident that

[9] See also A. 252-253 (Deposition of C. W. Aycock); A. 274-275 (Deposition of Donald Jackson); A. 294 (Deposition of Joe Wright); A. 310 (Deposition of James Wright); A. 323-324 (Deposition of Curtis Moreland); A. 352 (Deposition of Elgin Carmichael). This belief in the existence of racial bloc voting in Rome was disputed by local white officials (J.S. App. 11b n.39), but objective evidence of bloc voting by whites and blacks in Rome and in Floyd County was presented in the deposition of Dr. James W. Loewen. See note 19, *infra*.

the bloc voting patterns in Rome were consistent with those in the County over-all in that primary—particularly racial bloc voting among the white citizens of Rome (A. 364, 373).

B. Procedural History

On June 13, 1974, the Rome City Attorney submitted one annexation by the City for preclearance as required by Section 5 of the Voting Rights Act (A. 107-116). When the Assistant Attorney General for the Civil Rights Division discovered that other annexations had occurred, he asked the City on July 24, 1974, to make the additional submissions required by Section 5 (A. 117-119).[10] Nearly seven months later, on February 7, 1975, the City submitted a partial response (A. 119-120); following another request from the Assistant Attorney General on March 6, 1975 (A. 121-123),[11] the City sent its complete submission of the annexations on May 28, 1975 (A. 126-131). In response to an earlier inquiry in the Assistant Attorney General's letter of March 6, 1975 (A. 122-123), the City acknowledged in its May 28 letter that "the number of wards and the method of electing members to the Rome City Commission and the Rome Board of Education was changed in 1966 by legislative act" (A. 127).

[10] The date on this letter was omitted in the copy reproduced at A. 117-119; the record indicates that the letter was dated July 24, 1974.

[11] The date on this letter was omitted in the copy reproduced at A. 121-123; the record indicates that the letter was dated March 6, 1975.

On August 1, 1975, the Assistant Attorney General, on behalf of the Attorney General, declined to preclear the annexations, stating that because the method of electing the City Commission and the Board of Education had not been precleared, these changes would have to be submitted for preclearance before the effects of the annexations could be evaluated (A. 131-133). On August 19, 1975, the City submitted the 1966 changes to its charter, and also asked the Attorney General to reconsider his decision on the annexations (A. 133-138).[12]

On October 20, 1975, the Assistant Attorney General declined to preclear the provisions for majority vote, numbered posts, and staggered terms for City Commission and Board of Education elections, and the residency requirement for the Board of Education elections, concluding that in a majority white city like Rome, those voting changes would eliminate the opportunity for black voters to elect a candidate of their choice (A. 139, 140-141). The Assistant Attorney General withdrew his objection to 47 of the 60 annexations submitted by the City, finding that the areas either were not populated or had populations so small that the annexations would have at most "a *de minimis* effect on minority voting strength" (A. 141-142). He refused, however, to preclear the remaining 13, which either contained predominantly white populations of significant size or apparently were near such areas and were zoned for residential

[12] Minor changes enacted in 1967, 1970, and 1971 (J.S. App. 19e-27e) were also submitted at that time.

subdivision development; he explained that, given Rome's at-large method of electing city officials and the evidence of racial bloc voting in Rome, he could not conclude that these 13 annexations would not dilute the black vote (A. 142-143, 127-131).[13]

On May 21, 1976, the City asked the Assistant Attorney General to reconsider his disapproval of all disapproved aspects of the Section 5 submission (A. 143-154), and on July 13, 1976, the City provided additional data in support of that request (A. 155-159). On August 12, 1976, the Assistant Attorney General advised the City that he would not alter most of his prior determinations (A. 159-160). With respect to the 13 annexations, he stated that because his refusal to preclear the 1966 changes in school board elections revived the pre-existing plurality vote requirement, the annexations posed no problem for school board elections conducted under the pre-1966 procedures (A. 161). But because the pre-1966 City Commission election procedures contained a residency requirement, the Assistant Attorney General concluded that the 13 annexations could have a discriminatory impact if the City reverted to its former method of electing city commissioners, so the

[13] The Assistant Attorney General also pointed out that if the City undertook to use its former plurality-win method of electing the City Commission and the Board of Education or altered its procedures to elect them from fairly drawn single-member districts, he would reconsider his determination as to the 13 annexations in question (A. 142-143).

objection to the annexations on that basis remained (*ibid.*).[14]

On May 9, 1977, the City and two of its officials filed suit in the United States District Court for the District of Columbia against the United States, the Attorney General, and the Assistant Attorney General (A. 6). The plaintiffs sought a declaratory judgment that (1) the City was not covered by Section 5 of the Voting Rights Act; (2) Section 5 was unconstitutional; (3) the Attorney General enforced Section 5 in an unconstitutional manner; and (4) the changes submitted for Section 5 review were enforceable either because they had already been precleared, or because the Attorney General had failed to make a timely response to the City's request for reconsideration of its Section 5 submission (J.S. App. 16b-17b). The City also argued that it was entitled under Section 4(a) of the Act to be exempted—to "bail out"—from the coverage of Sections 4 and 5 (*ibid.*). A three-judge court, convened pursuant to 42 U.S.C. 1973b(a) and 1973c, rejected these claims, granting summary judgment for the

[14] In his August 12, 1976, letter the Assistant Attorney General also pointed out that since his continued objection to the 1966 charter amendments "renders the majority vote requirement numbered posts and residency requirement for Board of Education elections legally unenforceable the necessary effect of that objection is a reversion to the previously existing simple plurality-win system" (A. 160-161). The Assistant Attorney General also stated that he understood that the August elections for the City Commission and the Board of Education had been postponed, and he requested further information as to the City's intentions with respect to future primaries or elections (A. 161).

defendants on April 4, 1979 (*id.* at 1b-2b).[15] On May 2, 1979, the City and the individual plaintiffs filed a notice of appeal to this Court (*id.* at 1f-2f), and this Court noted probable jurisdiction on July 2, 1979.

C. The District Court's Decision

In declining to grant the requested relief, the district court first rejected the City's contention that it could invoke the declaratory judgment procedure of Section 4(a) of the Voting Rights Act to "bail out" from the coverage of Section 5 (J.S. App. 17b-23b). The court noted that Section 4(a) prohibits certain entities covered by Section 4(b) from using tests or devices as prerequisites for voting and subjects those entities to the preclearance requirements of Section 5 (*id.* at 17b-18b). Section 4(a) permits those same entities to exempt themselves from the requirements of Section 5 and other portions of the Act, if they can prove they have not used tests or devices for discriminatory purposes or with discriminatory effect for seventeen years. The court pointed out that by its terms the Act applies the "test or device" formula of Section 4(b) to two types of jurisdictions: an entire state, or a "political subdivision with respect

[15] In an earlier opinion issued February 22, 1978 (J.S. App. 1a-15a), the district court dismissed the City's claim that by failing to hold hearings or make findings on the Section 5 submission, the Attorney General had applied Section 5 in an unconstitutional manner. The court held that the Attorney General's method of reaching his administrative determination on a Section 5 submission is not subject to judicial review (*id.* at 4a-7a).

to which such determinations [that it qualified under the formula for coverage] have been made as a separate unit" (*id.* at 18b). These two entities are the only ones entitled by Section 4(a) to "bail out" (*ibid.*).

The court concluded that since the City had not been designated for coverage "as a separate unit," but was covered by virtue of its being part of a covered state—the State of Georgia—the City could not independently exempt itself from coverage (J.S. App. 18b-23b). In support of this interpretation of the statute, the district court cited express statements in the legislative history of the Voting Rights Act, revealing Congress' intent that where an entire state is covered, only that state—and not the separate municipalities within it—could exercise the option to exempt itself from coverage (*id.* at 20b-23b).

The court next rejected the City's claim that its electoral changes had previously been precleared by the Attorney General in 1968 (J.S. App. 23b-26b). The court ruled that in that 1968 submission, the Attorney General of Georgia did not "unambiguously" submit the specific changes made two years earlier in the City Charter, but submitted only a general state law that deferred to local option on certain electoral methods (*id.* at 25b-26b). The City's practices were not made an explicit part of the State's 1968 submission and therefore were not precleared when it was precleared (*ibid.*). The court also held that the Attorney General's August 12, 1976, denial of the City's request for reconsideration

of his prior objections was timely, since—in accordance with 28 C.F.R. 51.18(a)—it was mailed within 60 days of the City's voluntary submission of additional information on July 14, 1976 (*id.* at 27b-28b).

The court found that, as a three-judge court having jurisdiction over the claims arising under the Voting Rights Act, it had pendant jurisdiction over plaintiffs' challenges to the constitutionality of Section 5 (J.S. App. 30b-32b). On the basis of *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and subsequent decisions of this Court relying on it, the court rejected the City's claim that the enactment of Section 5 was beyond the power of Congress under the Fifteenth Amendment (J.S. App. 29b-30b, 32b-37b). In rejecting the City's claim that Section 5 violates principles of federalism (*id.* at 38b-42b), the court held that *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), on which the City principally relied, was inapposite since it involved the exercise of congressional power under the Commerce Clause. The court also rejected the claims of the two individual plaintiffs that by preventing the City from holding regularly scheduled elections, Section 5 had deprived them of their right to vote (*id.* at 42b-44b). The court pointed out that the City could have conducted elections using the pre-1966 procedures, and that the Attorney General had agreed to clear any technical changes necessary to permit elections under those procedures (*id.* at 42b-43b & n.79). The court also held that a delay in elections as a result

of the application of Section 5 is not unconstitutional since Section 5 is a narrowly drawn means of insuring that elections are free of racial discrimination (*id.* at 43b-44b).

Finally, on the merits the district court held that while none of the electoral changes or annexations at issue was intentionally discriminatory (J.S. App. 47b), the voting changes—particularly the new majority-vote requirement—would effectively eliminate the possibility, which existed under the old plurality system, that black voters in Rome could elect the candidate of their choice (*id.* at 47b-49b). The court also concluded that, given the existence of racial bloc voting and the residency requirement for City Commission candidates, it could not approve the 13 annexations (*id.* at 57b-58b).[16]

SUMMARY OF ARGUMENT

I

The language and legislative history of Section 5 of the Voting Rights Act of 1965, as well as this Court's decisions construing and applying it, make it clear that Section 5 prohibits changes in electoral procedures by a covered jurisdiction if it is not shown that the changes will not have the effect of

[16] The court dismissed the City's claim as to the annexations without prejudice to its renewal if the City abandoned the residency requirement for City Commission elections or took other effective measures to assure that black voters would have a fair opportunity to obtain representation reasonably commensurate with their post-annexation voting strength (J.S. App. 59b).

abridging or denying the right to vote on account of race or color. Proof that such changes were not enacted with a discriminatory purpose is an additional requirement for preclearance, not, as appellants contend, a sufficient basis for preclearance in itself. This settled interpretation has been the basis for thousands of preclearance determinations under Section 5 and it has been effectively ratified by Congress in its extensions of Section 5 in 1970 and 1975.

Applying Section 5 as thus construed, the district court correctly denied preclearance of the City's charter amendments and annexations because the City failed to show that they would not have the effect of abridging the voting rights of its black citizens.

In the context of an at-large system with a majority white population, the adoption of a majority-vote requirement, numbered posts, and staggered terms for City Commission and Board of Education elections, in conjunction with bloc voting by race, effectively precluded the City's black voters from the possibility of electing a candidate of their choice. This represented a distinct retrogression in the potential voting strength of the City's black citizens, because under the pre-1966 procedures they had the mathematical potential to elect a candidate of their choice.

The annexations, comprising areas in which both the total population and its component of registered voters were overwhelmingly white, were impermissible under Section 5 so long as the City declined to

make appropriate adjustments in its electoral procedures that would assure to blacks in the City "representation reasonably equivalent to their political strength in the enlarged community." *City of Richmond* v. *United States*, 422 U.S. 358, 370 (1975). Appellants failed to show that the electoral changes at issue would not represent a retrogression in the potential voting strength of the City's black voters.

II

The City cannot exempt itself from the preclearance requirements of the Voting Rights Act by filing a "bail-out" suit under Section 4(a). Congress intended to make that option available only to "covered" states and those political subdivisions that are covered by virtue of separate determinations that they come within the coverage formula of Section 4(b). The legislative history of the Act includes an express disavowal in the committee reports in both Houses of any intent to extend this option to subdivisions within a state covered in its entirety. This congressional intent is also implicit in the general scheme of the Act whereby Section 5 preclearance determinations—which could be expected to be, and have been, numerous—may be made either administratively, by the Attorney General, or judicially, in a suit filed in the United States District Court for the District of Columbia, while Section 4(a) exemption determinations may be made only in a suit filed in that judicial forum. Under appellants' construction of Section 4, the potential number of bail-out suits

would be in the thousands, a consequence Congress obviously did not intend.

This Court's decision in *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978), did not address the bail-out provision, but to the extent that it recognizes the intent of Congress to avoid splintering the Act's coverage of electoral procedure changes in a covered state, it supports the analysis of the district court in holding that the City could not be separately exempted under Section 4 (a), rather than the contrary contentions of appellants.

III

Appellants' challenges to the constitutionality of Section 5 as construed by the district court are essentially the same as arguments rejected by this Court in *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). Subsequent decisions of this Court concerning the Voting Rights Act and Section 2 of the Fifteenth Amendment reaffirm this Court's initial determination that Section 5 was an appropriate exercise of power under Section 2 of the Fifteenth Amendment and that it does not intrude on rights granted to the States and their citizens under other provisions of the Constitution.

1. Appellants contend that Congress lacks power under Section 2 of the Fifteenth Amendment to prohibit changes in electoral procedures that have discriminatory effects where there is no proof of purposeful discrimination in their enactment. This is so, they argue, because Section 1 of the Fifteenth

Amendment condemns only purposeful discrimination and because Congress may not, under Section 2, prohibit practices that do not violate Section 1. Appellants' argument is erroneous on at least two grounds. First, three decisions of this Court concerning the Voting Rights Act make it clear that Congress may prohibit such changes pursuant to its powers under Section 2 of the Amendment, whether or not those changes are, in themselves, constitutional violations. There need be only a basis on which Congress might reasonably have concluded that there is a risk that such changes might be made for discriminatory purposes and that a prophylactic rule is warranted. *South Carolina* v. *Katzenbach*, *supra*; *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). Congress made that determination anew in 1975, when it concluded that despite progress made under the Voting Rights Act in the preceding decade, a seven-year extension of Section 5 of the Act was warranted to assure that the gains made under the Act by racial minorities would not be extinguished as jurisdictions resorted to new measures to dilute minority voting strength.

In any event, construing Section 5 of the Act to prohibit the changes at issue here would not render it unconstitutional even assuming that Congress is restricted under Section 2 of the Fifteenth Amendment to prohibiting and remedying constitutional violations and that the Fifteenth Amendment by itself reaches only purposeful discrimination. The changes at issue here were enacted by a governmental entity

and they enhance the power of purposeful private discrimination, in the form of bloc voting by the white majority, to exclude blacks from participation in the electoral process. Construing the Fifteenth Amendment to prohibit such official action is consistent with decisions of this Court. *Terry* v. *Adams*, 345 U.S. 461 (1953); *Smith* v. *Allwright*, 321 U.S. 649 (1944).

2. The Voting Rights Act is not, as appellants contend, an unconstitutional invasion of state sovereignty or an infringement of the rights of private citizens. The Fifteenth Amendment by its very terms prohibits certain conduct by the States, and as legislation appropriate to enforce it, the Voting Rights Act of necessity intrudes on the pertinent areas of state activity. The contention of the individual appellants that they are being unconstitutionally deprived of their voting rights by the application of Section 5 to the electoral changes at issue is without merit. Section 5 does not prevent municipalities from conducting elections or citizens from voting in them; it simply helps to insure that when elections are held, members of any particular racial group will not be deprived of an opportunity for full participation equal to that enjoyed by members of other racial groups. The City has been free to hold elections, but has chosen not to do so.

IV

1. The district court correctly rejected appellants' contention that the Attorney General effectively precleared the 1966 changes in the City's charter when

he precleared the Municipal Election Code enacted by the State of Georgia in 1968 (Ga. Code Ann. §§ 34A-101 *et seq.* (1970)). In the submission of that Code for preclearance in 1968, it was not made apparent what impact it would have on particular municipalities such as the City of Rome, so its application to the City could not have been precleared. In any event, the 1968 Code made no changes in the City's electoral procedures, but merely permitted the City to retain procedures it had adopted in 1966.

2. The district court also correctly held that, under the Attorney General's reasonable interpretation of his own regulations, he gave a timely response to the City's request for reconsideration of the changes to which he had previously interposed timely objections. In any event, even if the Attorney General had not timely complied with the regulations governing requests for reconsideration, the effect would not have been to preclear the proposed changes. The regulations state only that the Attorney General will make his decision on reconsideration and notify the requesting authority within 60 days. Nothing in either the regulations or the Voting Rights Act provides that a timely objection by the Attorney General will be deemed withdrawn if he fails to respond to a request for reconsideration within a given time. A failure by the Attorney General to respond within the time prescribed by his regulations might have entitled appellants to a court order requiring a prompt response, but there is no basis for holding that it would have abrogated the protections of the Act.

ARGUMENT

I. UNDER SECTION 5 OF THE VOTING RIGHTS ACT THE DISTRICT COURT PROPERLY DISAPPROVED THE ELECTORAL CHANGES AND ANNEXATIONS AT ISSUE HERE BECAUSE THEIR EFFECT WOULD BE TO ABRIDGE THE RIGHT TO VOTE ON ACCOUNT OF RACE OR COLOR

A. In A Covered Jurisdiction, Section 5 Of The Voting Rights Act Permits Only Those Changes In Electoral Procedures That Do Not Have The Purpose And Will Not Have The Effect Of Denying Or Abridging The Right To Vote On Account Of Race Or Color

Appellants first argue that because the electoral changes and annexations at issue here were enacted without discriminatory purpose, they are not prohibited by Section 5 of the Voting Rights Act (Br. 24-38).[17] In so doing they ask this Court to construe Section 5 to impose a less stringent standard than that dictated plainly and unambiguously by its own terms, and to depart from this Court's settled interpretation of Section 5—an interpretation that is consistent with the statute's plain meaning and that has been ratified by Congress in its reenactments of the Voting Rights Act.

[17] As noted at page 6, note 4, *supra*, the obligation of complying with the preclearance requirements of Section 5 is triggered by the coverage formula of Section 4(b), 42 U.S.C. 1973b(b). Appellants concede that by virtue of the State of Georgia's designation as a covered jurisdiction in 1965, the City of Rome is bound to comply with Section 5 (Br. 24-25), abandoning their contrary claim made in the district court (A. 26-27).

Section 5 provides that in a declaratory judgment suit brought by a covered jurisdiction to obtain judicial preclearance of a change in election procedures, the district court can approve such a change only upon finding that it "does not have the purpose *and* will not have the effect of denying or abridging the right to vote on account of race or color" (42 U.S.C. 1973c) (emphasis added)). The use of the conjunction "and" requires that plaintiffs prove not only an absence of discriminatory intent, but also an absence of discriminatory impact before the court can permit the electoral change to be implemented. If Congress had intended that a finding of a lack of invidious purpose would suffice for approval of a change in electoral procedures—the construction urged by appellants—it presumably would have used the conjunction "or" instead of "and." [18]

[18] Appellants' explanation (Br. 26) of how the references to "purpose" and "effect" in Section 5 should be construed and applied by a court in a preclearance suit is unsound also because it ignores the fact that the statute defines the matters to be proven in the negative, clearly placing on the plaintiff the burden of proving their absence. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966). Appellants argue that when a court finds that direct evidence of purpose (other than "effect" evidence) leaves it unclear whether discriminatory purpose exists, the court should look to "effect" to see "if it calls for an inference of 'purpose'" (*ibid.*). Under the Act's terms, however, if the evidence is insufficient to prove that the changes at issue "do not have the purpose" of "denying or abridging the right to vote on account of race or color," the court must deny preclearance whether or not additional evidence in the form of an inference from effect tends to prove discriminatory purpose.

This Court's interpretation of the requirements of Section 5 has been fully consistent with the plain meaning of that provision. In *City of Richmond* v *United States*, 422 U.S. 358 (1975), the Court reviewed a declaratory judgment action seeking Section 5 approval of an annexation. The Court conducted a two-part analysis of the proposed annexation. First (*id.* at 367-372), it explained and applied the "principles" that "govern the application of § 5 insofar as it forbids changes in voting procedures having the effect of denying or abridging the right to vote on the grounds of race or color" (*id.* at 372); the Court concluded that the annexation would not have the proscribed effect and that preclearance could therefore not be denied on that ground. The Court then observed (*ibid.*) that Section 5 "also proscribes changes that are made with the purpose of denying the right to vote" on account of race or color. It determined that the lower court's findings on purpose were incomplete, and remanded the case for such findings so that it could be decided whether the annexation was forbidden by Section 5 on the independent ground that, whatever its effects might be, it had been devised for "the purpose of denying the vote on the grounds of race or color." *Id.* at 378. In sum, in *City of Richmond*, this Court expressly recognized that Section 5 imposes a dual requirement for preclearance of voting changes: they must be free of discriminatory purpose and they must be free of discriminatory effect. See also *Beer* v. *United States*, 425 U.S. 130, 141 (1976); *Georgia* v. *United*

States, 411 U.S. 526, 531, 538-539 (1973); *Perkins* v. *Matthews*, 400 U.S. 379, 387, 388 (1971); *City of Petersburg* v. *United States*, 354 F.Supp. 1021, 1027-1028 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973).

Moreover, Congress has ratified that reading of the Act by extending the Voting Rights Act for a second time in 1975, when the construction placed on Section 5 by the Attorney General and this Court was clear and well established. Indeed, the House and Senate Reports both refer, with approval, to this Court's decision in *Perkins* v. *Matthews*, *supra*, and themselves describe Section 5 in terms that recognize its imposition of dual requirements. S. Rep. No. 94-295, 94th Cong., 1st Sess. 15, 16 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 9 (1975). See also H.R. Rep. No. 91-397, 91st Cong., 1st Sess. 8 (1969) (regarding 1970 extension).

Appellants argue that this well-settled understanding of Section 5 must be discarded because the Fifteenth Amendment forbids only purposeful discrimination, and in enacting legislation such as Section 5 to enforce the Fifteenth Amendment, Congress could not prohibit voting practices devoid of discriminatory purpose although discriminatory in effect (Br. 26, 46-48). As we explain in point III (pages 50-59, *infra*), this unduly narrow view of Congress' powers under the enforcement sections of the Civil War Amendments was rejected by this Court in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966) and *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), and appellants advance no sound reason for overruling those decisions.

B. The Record Sustains The District Court's Determination That The 1966 Electoral Changes And Annexations In Rome Would Have The Effect Of Abridging The Right To Vote By Effectively Preventing Black Citizens From Electing A Candidate Of Their Choice

Assuming arguendo that a failure to prove lack of discriminatory impact suffices under Section 5 to invalidate an electoral change, appellants next challenge the district court's conclusion that the City failed to show that the 1966 charter amendments and annexations would not impermissibly dilute black voting strength in Rome. That challenge must fail. The record contains ample evidence supporting the district court's finding of dilution, and the court therefore properly held that the City had failed to carry its burden of proof that the changes at issue would not have the effect of denying or abridging the right to vote on account of race or color.

Legal principles relevant to the determination whether a particular electoral practice or annexation dilutes the voting strength of a particular group are set out in *White* v. *Regester*, 412 U.S. 755 (1973), in which this Court affirmed the findings of a three-judge district court that electoral procedures in two Texas counties unconstitutionally abridged the voting rights of black and Hispanic citizens. That case involved a finding of purposeful discrimination in violation of the Fourteenth Amendment, but the Court's description of the evidence probative of unconstitutional dilution applies, a fortiori, to dilution determinations under Section 5 of the Voting Rights Act, since discriminatory effect alone will bar preclearance

of a changed procedure. In *White* v. *Regester*, *supra*, 412 U.S. at 766, this Court explained that impermissible dilution exists where the evidence shows "that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." In the context of a Section 5 evaluation, the standard to be applied is whether the change will enhance, leave undisturbed, or set back a racial group's access to the political process. As this Court pointed out in upholding under Section 5 a reapportionment in New Orleans in *Beer* v. *United States*, *supra*, 425 U.S. at 141 (footnote omitted):

> When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that "the standard [under § 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting * * *." H.R. Rep. No. 94-196, p. 60 (emphasis added). In other words the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.

The district court correctly applied these principles in concluding here that the 1966 charter amendments would diminish the effective exercise of the franchise by Rome's black citizens. Its finding of diminution of black voting strength was based on the combined effect of racial bloc voting in Rome (J.S. App. 11b-13b)[19] and the change from plurality-win to majority-

[19] Appellants contest the district court's finding of racial bloc voting (Br. 35-37), but the only evidence they offered below to demonstrate its absence was the testimony of white city officials, whom the district court appropriately termed "interested witnesses" (J.S. App. 12b). The perception of the black witnesses was virtually unanimous as to the existence of bloc voting along racial lines (J.S. App. 11b), and while it is true that Rev. Hill must have received some white votes in his unsuccessful school board run-off election (Br. 36), it is nonetheless likely—as the district court found (J.S. App. 12b)—that Rev. Hill's defeat in that election was caused by white electoral support for his white opponent.

Appellants also disparage the district court's reliance on evidence presented by the United States' expert witness, Dr. James Loewen (Br. 36-37). Dr. Loewen testified concerning bloc voting in Floyd County, Georgia—in which Rome is the largest city—in the 1968 Democratic primary election for United States Senate. Quoting Dr. Loewen's deposition testimony out of context and citing not to the deposition itself but to their own brief in response to the United States' motion for summary judgment, appellants imply (Br. 36) that Dr. Loewen had no fixed opinion about the existence of racial bloc voting in the City of Rome. But the very next sentence of Dr. Loewen's testimony—omitted by appellants—expresses his belief on the basis of his study of Floyd County that bloc voting in Rome was likely (Loewen Deposition at 50): "My prediction based on this analysis is that there would be racial bloc voting." Earlier in his deposition he explained in some detail why his conclusions as to the pattern of racial bloc voting in the County indicated that such patterns existed in

win elections, numbered posts, and staggered terms —all in the context of Rome's majority white population and the at-large system that predated the 1966 amendments (J.S. App. 47b-49b).[20] The district court summarized the dilutive impact of the 1966 changes as follows (J.S. App. 47b-48b) (footnotes omitted):

> With respect to the majority vote and runoff election provisions, the discriminatory effect is clear beyond peradventure. Under the plurality win system, a black candidate in Rome would stand a good chance of election if the white citizens split their votes among numerous candidates and the black voters engaged in "single-shot" voting, *i.e.*, voted only for the candidate or candidates of their choice. Under the majority vote/runoff election scheme, however, the black candidate, even if he gained a plurality of votes in the general election, would still have to face the runner-up white candidates in a head-to-head

the City of Rome as well (Loewen Deposition at 16, 42, 45-46, 58; A. 364, 373-375). On the basis of the entire record, the district court's finding of bloc voting by race in Rome cannot be said to be clearly erroneous, and should be upheld.

[20] In 1975, when it extended the operation of Section 5 for seven years, Congress specifically mentioned majority vote, numbered posts, and staggered terms as being among the devices used to reduce or eliminate the electoral gains made by black voters (H.R. Rep. No. 94-196, 94th Cong. 1st Sess. 10 (1975)). In *White* v. *Regester*, *supra*, 412 U.S. at 766, 767, this Court noted with approval the district court's finding that majority-vote and specified-place rules—neither improper nor invidious in themselves—enhanced the opportunity for racial discrimination.

> runoff election, in which, given bloc voting by race and a white majority, the black candidate would be at a severe disadvantage. Rev. Hill's Board of Education campaign exemplifies the dilutive effect on black voting strength of these rules: he would have been elected under the pre-1966 plurality-win system, but was defeated by the white candidate in the runoff election under the majority vote regime.[21]

In the typical Section 5 preclearance case, the Attorney General or district court is required to make a prediction as to the probable impact of the change on the electoral position of a particular group before the change has been effectuated. In this case, by contrast, Rome had operated for eight years under the 1966 amendments before they were submitted for preclearance, and conducted eight elections in that time.[22] Thus, the record before both the Attorney General and the district court presented data as to the actual operation of the challenged procedures. As the district court recognized, there could not have been a more graphic illustration of the dilutive impact of the 1966 changes than Rev. Hill's defeat in the 1970 school board contest. On that basis, invalidation of the 1966 charter amendments under Section 5 was mandated by this Court's holding in *Beer* v. *United*

[21] The court also concluded that the City had not met its burden of demonstrating that the numbered posts, staggered terms, and residency requirement for Board of Education elections would not have a racially discriminatory impact (J.S. App. 49b).

[22] The City conducted Board of Education elections in 1967, City Commission elections in 1968, and elections for both bodies in 1970, 1972, and 1974 (J.S. App. 1e; A. 71, 74-79).

States, supra, 425 U.S. at 141, that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Retrogression had occurred because under the plurality-win system black voters in Rome had the potential to elect a candidate of their choice (as demonstrated by Rev. Hill's 1970 plurality prior to the runoff), and under the majority-win system that potential was substantially diminished—indeed, apparently eliminated. Accordingly, the district court's conclusion that the City failed in its burden of proving the absence of discriminatory effect was correct and should be affirmed.

Appellants claim that if the court had applied the criteria for determining dilution approved by the Court of Appeals for the Fifth Circuit in *Zimmer* v. *McKeithen,* 485 F.2d 1297 (1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parrish School Board* v. *Marshall,* 424 U.S. 636 (1976), it would not have found the 1966 amendments to have a discriminatory impact (Br. 29-30). The *Zimmer* criteria, however, are addressed to the determination of a constitutional violation, rather than of the retrogression prohibited by the Voting Rights Act.[23] More-

[23] In *Zimmer* the court of appeals did not reach the Section 5 claim raised by the appellants (485 F.2d at 1302), because it concluded that the dilutive impact of the challenged apportionment scheme violated the Fifteenth Amendment (*id.* at 1307).

In a subsequent case, *Nevett* v. *Sides,* 571 F.2d 209, 222 (1978), petition for cert. pending, No. 78-492, the Fifth

over, the quotation from *Zimmer* in appellants' brief (Br. 30) omits the very factors that enhance the proof of dilution here (485 F.2d at 1305 (footnote omitted; emphasis added)):

> [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. *Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.*[24]

Circuit observed that since dilutive effect is established simply by a showing of racially polarized voting in an at-large system of elections, the factors enumerated in *Zimmer* are addressed to proving not *effect* but *purpose*. Thus their presence or absence here is not determinative of discriminatory impact. In fact, to the extent that *Zimmer* factors *are* present here, they call into question appellants' assertion and the district court's finding of an absence of invidious purpose. In any event, in affirming the result in *Zimmer*, this Court specifically declined to address the correctness of the constitutional views expressed by the court of appeals (*East Carroll Parish School Board* v. *Marshall*, *supra*, 424 U.S. at 638).

[24] The court of appeals in *Zimmer* also observed (485 F.2d at 1305) that under this Court's opinion in *White* v. *Regester*, *supra*, not all of these factors need be proved in order to make out a case of dilution sufficient to warrant relief.

Applying these criteria in the instant case, it appears that the state policy underlying the 1966 Rome charter amendments was "tenuous" at best. The majority vote requirement was first introduced by the City Attorney in the mistaken belief that state law required it (J.S. App. 47b); not only was there no such state requirement, but when the legislature enacted the Georgia Municipal Election Code in 1968 it allowed those cities with a plurality-win system to retain it (J.S. App. 1d-2d). As for the existence of "past discrimination" precluding "effective participation in the election system," that factor is evidenced by Georgia's status as a jurisdiction covered by Section 5, and the fact that only a small number of blacks in Rome were registered to vote until a voter registration campaign was launched in the 1960's to combat the perception that black votes were not being counted in city elections (A. 269-270). Most significant among the "*Zimmer*" factors present here is the 1966 change to a majority vote requirement, which, in combination with the pre-existing at-large scheme, has been demonstrated to dilute the voting strength of Rome's black citizens so that they are powerless to elect a candidate of their choice. In both *White* v. *Regester* and *Zimmer* itself, the majority vote requirement was critical in the court's finding of dilution.[25]

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[25] Appellants stress the absence of evidence that Rome's officials are insensitive to black interests (Br. 30 n.16), but such evidence was also lacking in *Zimmer* (485 F.2d at 1306), and the court of appeals and this Court nonetheless upheld the ultimate finding of dilution.

In sum, to the extent that *Zimmer* establishes the relevant criteria, see note 23, *supra*, reference to the *Zimmer* standards reinforces the conclusion that the district court correctly found dilution on the evidence presented here. Appellants' assertion to the contrary is predicated on an incomplete reading of *Zimmer* and should be rejected.

In considering the contested annexations, the district court properly applied the principles stated in *City of Petersburg* v. *United States*, *supra*, and in *City of Richmond* v. *United States*, *supra*. In *Richmond*, this Court quoted with approval language from *Petersburg* making it clear that an annexation could not be barred under Section 5 simply because it resulted in a population shift that increased the proportion of whites at the expense of blacks or even because it converted a black-majority city into a white-majority city. Such a prohibition, as the district court in *Petersburg* had explained, would mean that a city having a black majority surrounded by geographical areas in which whites were a majority "would be effectively locked into its original boundaries"—a result that Congress could hardly have intended. 354 F. Supp. at 1030, quoted in *City of Richmond* v. *United States*, *supra*, 422 U.S. at 369. The *Petersburg* annexation was nonetheless forbidden by Section 5 because of its effect on black voting strength considered in the context of existing electoral procedures. As this Court explained in *Richmond* (422 U.S. at 370):

> *Petersburg* was correctly decided. On the facts there presented, the annexation of an area with a white majority, combined with at-large councilmanic elections and racial voting, created or enhanced the power of the white majority to exclude Negroes totally from participation in the governing of the city through membership on the city council. We agreed, however, that that consequence would be satisfactorily obviated if at-large elections were replaced by a ward system of choosing councilmen. It is our view that a fairly designed ward plan in such circumstances would not only prevent the total exclusion of Negroes from membership on the council but would afford them representation reasonably equivalent to their political strength in the enlarged community.

Thus in the present case the district court acknowledged that "impact on black voting strength"—the simple calculation of the increases by number and percentage of registered voters among blacks and whites resulting from clearance of the annexations—was only the first part of its "effect" inquiry under Section 5. In making this threshold determination, the court looked at the cumulative effect of the annexations, considered "from the present perspective"—a reasonable procedure in view of the fact that the City had failed to submit each annexation for approval when it occurred and that the Act's purposes could be frustrated by permitting substantial diminutions of black voting strength simply because they took place through "piecemeal changes" (J.S. App. 53b). The court noted that in February 1978 the 13 con-

tested annexations—which took place at various times between 1965 and 1973 (A. 66) and which were not submitted to the Attorney General for preclearance until 1975—contained a registered voter total of 823 whites and 9 blacks (J.S. App. 53b). Since, according to the court's calculations, those 823 registered voters represented "close to 10%" of the City's registered white voters, whereas the 9 registered black voters in the annexed areas were a negligible portion of the black electorate, the court concluded that approving the annexations would have a sufficiently significant impact on black voting strength to warrant making the second part of the "effect" determination—the determination whether the black community would have "a fair opportunity to obtain representation reasonably commensurate with its post-annexation numerical strength" (*id.* at 54b).[26]

[26] The court's estimates were based on the assumption that the latest citywide totals for registered voters contained in the record—1975 figures showing a total of 10,982 white registered voters and 2,026 black registered voters (A. 58)—did not include persons living in the annexed areas. The court accordingly added the 1975 citywide figures to the 1978 figures for the annexed areas before calculating the percentage increases for whites and blacks. If one assumes, however, (1) that the 1975 citywide figures *included* persons in the annexed areas (because the City had carried through with its annexations despite lack of Section 5 preclearance and because the record does not indicate that the 1975 totals included less than all registered voters then on the rolls) and (2) that the population in the annexed areas did not change greatly between 1975 and 1978, then the 1978 annexed area figures should be directly compared with the 1975 figures. Under that analysis, the increase in white registered voters would be about 7.5%; the increase for blacks would still be about .4%. Using those same assumptions, and looking at the shift in racial composition of the electorate as a whole brought about by the annexations, yields a total of 13,008 registered voters in 1975 (after the annexations), consisting of 10,982 whites (84.4%) and 2,026 blacks (15.6%), compared with pre-annexation totals of 10,159 whites (83.4%) and 2,017 blacks (16.6%). The blacks thus lose one percent and the whites gain by the same amount, resulting in a total difference of two percent.

Obviously all of these calculations yield only estimates because the lack of clearly identified 1975 and 1978 figures for both the City as a whole and the annexed areas as a separate component makes it necessary to revert to inferences and predictions. Appellants (Br. 13-14 n.7) criticize the court's efforts to bridge the gaps, and, in particular, assert that the white registered voters in the annexed areas should not be considered new voters because they probably moved there from pre-annexation areas of the City. This argument ignores the question of the *present* impact of approving the annexations and, what is most important, ignores the fact that the burden was on appellants to prove lack of effect. If they had figures making possible a more accurate assessment of impact on black voting strength or supporting their contentions with respect to the original residence of the population in the annexed areas, it was incumbent on them to supply them. Having failed to submit evidence bearing on an issue as to which they have the burden of proof, they cannot now be heard to complain that inferences are drawn against them.

The court concluded that because of the features of the City's electoral system, and particularly those features as to which preclearance had been denied (see pages 30-36, *supra*), the black community did not have such an opportunity. As the court found, the increase in the number of registered white voters that would occur if the annexations were approved would simply reinforce "the discriminatory effect of

these voting rules," making it even more certain that the opportunity for blacks to elect a candidate of their choice would be blocked by the votes of the white majority (J.S. App. 54b). "Even under the pre-1966 rules," the court held (*ibid*), the effect of annexations would be to aggravate those features of the pre-1966 plan that had repeatedly lent themselves to frustrations of effective black participation in the electoral process (see Statement, *supra*, page 4 and note 2). Under *Petersburg* and *City of Richmond*, therefore, the court correctly held that the annexations should be precleared only if appropriate steps were taken to ameliorate their adverse effects on minority voting strength so that the electoral system will "fairly reflect[] the strength of the Negro community as it exists after the annexation" (*City of Richmond, supra*, 422 U.S. at 371).

This, of course, did not mean that the City was precluded from keeping these annexed areas. It meant only that if it wished to retain them, it should make such adjustments in its electoral system as would give black voters a fair opportunity for effective participation in the electoral process. Moreover, the City had more than one option open to it.

First, the City could have reverted to elections under its pre-1966 procedures (which did not include the objectionable features of majority-win requirements, numbered posts, and staggered terms), making only one minor adjustment—dropping its residency requirement for City Commission elections.[27] Although a geographical residency requirement can ameliorate dilution of the black vote in an at-large electoral system with a majority vote requirement (see, *e.g.*, *Zimmer* v. *McKeithen, supra*, 485 F.2d at 1305), it had had the opposite effect in the City's pre-1966 plurality-win system for electing nine commissioners from nine wards by reducing the number of potential candidates from any one of the nine wards, thereby promoting head-to-head contests in which racial bloc voting would guarantee the success of the white candidate. In that respect the residency requirement had functioned, and would again function, like a numbered post requirement. Because the elections would be more likely to result in two candidates from a given ward being pitted against each other, a plurality-win system would, in effect, be converted into a majority-win system, with racial bloc voting ordinarily guaranteeing victory to the white candidate.[28]

If the City wished to retain both a residency requirement and at-large elections, on the other hand, it could couple its pre-1966 procedures with its sub-

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[27] Because there was no such requirement for Board of Education elections under pre-1966 procedures, the Attorney General did not condition preclearance of the annexations on any change in Board of Education elections held under pre-1966 rules (J.S. App. 57b-58b; A. 160-161).

[28] It is conceivable that one or more of the nine wards might have contained no potential white candidates, thereby guaranteeing black representation, but appellants presented no evidence of this.

sequent shift to a system of electing three commissioners from each of three wards. (The Attorney General had not objected to the change from nine wards to three larger wards.) When candidates are running concurrently for three unnumbered positions in each of the three wards, without a majority-vote requirement, there can be no head-to-head contest, and single-shot voting by black voters would give them a chance to elect the candidate they supported.

Finally, the City could simply convert to a single-member district system, which, as this Court has recognized (*White* v. *Regester*, *supra*), may help to prevent the submergence of the vote of a racial minority. The district court hesitated to impose this as the sole condition on which the annexations might be approved, but it is certainly an option the City could voluntarily adopt if it preferred that to the other available means of ameliorating dilution. However, with no adjustments at all in the procedures for electing members of the City Commission, it cannot be said that black voters in a City that includes all the annexed areas will have "representation reasonably equivalent to their political strength in the enlarged community." *City of Richmond* v. *United States*, *supra*, 422 U.S. at 370. The district court accordingly did not err in denying preclearance of the 13 contested annexations.

II. SECTION 4(a) OF THE VOTING RIGHTS ACT DOES NOT PERMIT A MUNICIPALITY IN A STATE COVERED BY SECTIONS 4(a) AND 5 TO FILE AN INDEPENDENT ACTION TO EXEMPT ITSELF FROM COVERAGE OF THE ACT

Appellants next contend that the district court erred in holding that the Voting Rights Act does not permit the City individually to "bail out" from the coverage of Sections 4(a) and 5 of the Act (J.S. App. 17b-23b). This contention is contrary to the language and legislative history of the Act, and is without support in the opinions of this Court.

Section 4(a) prohibits the use of voting tests and devices (42 U.S.C. 1973b(a) (emphasis added))

> in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision *with respect to which such determinations have been made as a separate unit*, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by *such* State or *subdivision* against the United States has determined that no such test or device has been used during the seventeen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color * * *.

Accordingly, the political entities authorized to file bail-out actions are those, and only those, to which the formula of Section 4(b) has been separately applied. The State of Georgia was determined to be

covered by Section 4(a) in 1965 (30 Fed. Reg. 9897 (1965)). The coverage formula of Section 4 (b) was never applied to the City "as a separate unit"; the prohibitions of Section 4(a) cover the City because it is part of a covered State—a fact that appellants concede (Br. 18 n.11). See *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978) (hereinafter "*Sheffield*"). Nothing in the Act allows the City to file an independent bail-out action; the bail-out action that would exempt the City must be filed by, and seek to exempt all of, the State of Georgia.

The legislative history of the Act supports the district court's conclusion on this question. The coverage formula of Section 4(b) was designed to limit the Act's most stringent remedies to those areas of the country where congressional investigation had disclosed the most prevalent and pervasive degree of racial discrimination in voting. See H.R. Rep. No. 439, 89th Cong., 1st Sess. 8, 12-14 (1965); S. Rep. No. 162 (Pt. 3), 89th Cong., 1st Sess. 13-16 (1965) (joint report of 12 members of the Judiciary Committee); see also *Sheffield*, *supra*, 435 U.S. at 119-120. In those areas, not only did Congress suspend the use of voting tests and devices used often in the past as tools of discrimination, but it also froze voting procedures and required the new procedures to be federally reviewed before they could be enforced. Congress did so because in those areas public officials had often devised new discriminatory voting schemes that would avoid the impact of court decisions in-

validating existing discriminatory practices (S. Rep. No. 162, *supra*, at 12; H.R. Rep. No. 91-397, *supra*, at 6-7; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966)).

Congress explicitly intended the strictures of the Act to apply to all parts of a State covered by Sections 4 and 5 of the Act until the State could establish that all discrimination caused by the use of tests and devices had ceased for a substantial period. Only then could the State exempt itself, and all parts of it, from the provisions of Sections 4 and 5. As the relevant House Report explains (H.R. Rep. No. 439, *supra*, at 14):

> This opportunity to obtain exemption is afforded only to those States or to those subdivisions as to which the formula has been determined to apply as a separate unit; subdivisions within a State which is covered by the formula are not afforded the opportunity for separate exemption.

And the Senate Committee's majority report similarly states (S. Rep. No. 162, *supra*, at 16):

> We are also of the view that an entire State covered by the test and device prohibition of section 4 must be able to lift the prohibition if any part of it is to be relieved from the requirements of section 4.

See also S. Rep. No. 162, *supra*, at 21.[29]

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[29] Appellants concede that if this Court is to accept their interpretation of Section 4(a), this legislative history "must or should be ignored" (Br. 45).

This scheme also reflects practical considerations with respect to the potential burden on the courts and litigants. The determination under Section 5 whether a particular change in procedures affecting voting can be said not to have either the proscribed purpose or the proscribed effect may be made either administratively, by the Attorney General, or in a suit heard by a three-judge court in the United States District Court for the District of Columbia, with direct appeal to this Court. The administrative option helps assure that the designated judicial forum will not be overloaded with Voting Rights Act litigation and that covered jurisdictions can secure approval of many unobjectionable changes without the burden of litigation. By contrast, the determination under Section 4(a) whether the designated covered jurisdictions meet the requirements for exemption from the Act's preclearance requirements may be made only by a three-judge court in the District of Columbia. This does not threaten an undue burden on that court if Section 4(a) is construed in accordance with what we have shown to have been the express intent of Congress. Under appellants' reading of the Act, however, the number of potential suits is extremely large. A survey made by the Civil Rights Division of the Department of Justice (Appendix, *infra*) indicates that in the nine states covered in their entirety alone there are approximately 7000 state and local government entities with the authority to make changes affecting voting. If even 10% of those entities decided to bring bail-out actions, the burden

on the district court in the District of Columbia would be overwhelming. The sensitivity of Congress to this problem in its drafting of Section 5 further confirms that it could not have intended the construction of Section 4(a) that appellants propose.

Appellants rely primarily on this Court's opinion in *Sheffield, supra*, in arguing that the City can independently bail out from coverage. *Sheffield*, however, said only that all political units within a State covered by Section 4(a) are required to preclear new voting procedures for Section 5 review even if those units do not register voters (435 U.S. at 135). As the Court explained, the scope of Sections 4(a) and 5 is "geographic" or "territorial" (*id.* at 120, 126), so that all political units within a covered State which deal in any way with the voting process are subject to the prohibitions of those sections. When an entire State is covered, the concept of what parts of it are "political subdivisions" has no relevance (*id.* at 126-129).

There was no occasion for the Court to discuss the bail-out provision in *Sheffield*, and it did not do so. *Sheffield* does, however, support the district court's analysis here, by making clear that Congress opposed any splintering of the Act's coverage of the practices of an entire covered State, since such fragmentation would require repeated litigation to safeguard minority rights, given the influence of State authorities over local election practices (435 U.S. at 125). The district court noted that fact (J.S. App. 21b-22b), as well as the potential risk that "covered States

could circumvent the purposes of the Act simply by causing their sub-jurisdictions that have successfully pursued a bail-out remedy to engage in discriminatory practices" (*id.* at 22b).[30]

In sum, the district court's conclusion that the Voting Rights Act does not permit a municipality such as the City of Rome to bail out independently from its requirements is solidly grounded in the language of the Act and its underlying purpose, as expressed in its legislative history and reflected in the decisions of this Court.

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[30] Section 5 is specifically addressed to covered states or separately covered jurisdictions that "*enact* or seek to administer" voting changes (42 U.S.C. 1973c) (emphasis supplied)). Here it is the State of Georgia—not the City of Rome—that enacted the 1966 charter amendments. Accordingly, the changes here at issue would still be subject to Section 5 even if the City had been successful in the bail-out aspects of its suit.

Moreover, since in Georgia only the state legislature may enact changes in the electoral procedures of municipalities (Ga. Code Ann. § 69-1018 (1976)), any future changes in such procedures for the City's elections—including any delegation of power to the City to write its own election laws—would be subject to Section 5 procedures. The district court's discernment of a risk that the State might nevertheless be able to subvert the purposes of the Act is reasonable, however, since it would be difficult to deny clearance to such a delegation of authority, in the absence of evidence of discriminatory purpose or of how the City would subsequently use such authority.

III. THIS COURT SHOULD ADHERE TO ITS PRIOR DECISIONS UPHOLDING THE CONSTITUTIONALITY OF SECTION 5 OF THE VOTING RIGHTS ACT AS A PROPER EXERCISE OF CONGRESS' POWER TO ENFORCE THE GUARANTEES OF THE FIFTEENTH AMENDMENT

Appellants raise two constitutional challenges to Section 5. First, they argue that in reaching electoral procedures and annexations enacted without invidious intent, it exceeds the scope of congressional power under the Fifteenth Amendment (Br. 46-68). Second, they claim that Section 5 is an unconstitutional intrusion on prerogatives properly belonging to the States and their citizens under the First, Fifth, Ninth, and Tenth Amendments (Br. 68-93). These challenges are essentially comprehended in "the basic question" this Court answered in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 324 (1966): "Has Congress [in the Voting Rights Act of 1965] exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" This Court held that Congress' exercise of power in enacting that statute was entirely appropriate, and subsequent decisions of this Court have reaffirmed that determination. In conformity with these decisions, Section 5 has been applied to many thousands of electoral changes since 1965.[31] Under familiar prin-

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[31] See, *e.g.*, S. Rep. No. 94-295, 94th Cong., 1st Sess. 16-17 (1975). Recent data collected by the Civil Rights Division of the Department of Justice indicates that the numbers of Section 5 submissions by covered jurisdictions in 1976, 1977, and 1978 were, respectively, 7,470, 4,007, and 4,675. From 1965 through June 30, 1979, 25,964 submissions were made.

ciples of *stare decisis*, only the weightiest of considerations should persuade this Court to overrule its settled and well-reasoned body of case law interpreting Section 2 of the Fifteenth Amendment and the Voting Rights Act. None of the arguments presented by appellants in support of their position warrants such a drastic departure from precedent, or, indeed, offers any substantial new ingredient for consideration. Accordingly, appellants' constitutional claims should be rejected.

A. Congress May, Through Section 5, Permissibly Proscribe Changes In Electoral Procedures Which Have The Effect Of Denying Or Abridging The Right To Vote On Account Of Race Or Color, Whether Or Not They Were Enacted With A Discriminatory Purpose

Appellants contend (Br. 46-67) that, even assuming the changes in electoral procedures at issue have racially discriminatory effects, Congress lacks the power under the Fifteenth Amendment to prohibit them where there is no proof of purposeful discrimination in their enactment. Acceptance of this contention would seriously undermine the Voting Rights Act—the remedial scheme that has proven to be the most effective mechanism in more than 100 years for enforcing the long unvindicated guarantees of the Fifteenth Amendment. For by creating in Section 5 of the Act a bar to the use in covered states of new electoral procedures having discriminatory effects, Congress employed its power under the Fifteenth Amendment to overcome the continuing effects of past discrimination, to prevent its recurrence, and to

prohibit conduct as to which a strong inference of invidious purpose exists. In any event, appellants' contention is inconsistent with decisions of this Court.

The contention rests on two premises: (1) that electoral procedures enacted and administered without invidious racial purpose on the part of government officials may, under no circumstances, be found to violate Section 1 of the Fifteenth Amendment (Br. 47-53) and (2) that Congress lacks the power under Section 2 of the Fifteenth Amendment to prohibit procedures that do not in themselves violate Section 1 (Br. 53-67). Both premises are essential to appellants' argument. Thus, although we argue below (pages 59-62, *infra*) that at least those election procedures that enhance the power of private discrimination to exclude blacks from meaningful participation in the electoral process are unconstitutional under Section 1 of the Fifteenth Amendment, this Court need not reach that contention if it agrees with our primary submission, namely that Congress may prohibit such procedures under Section 2, whether or not they are, in themselves, constitutional violations.

1. *In exercising its power under Section 2 of the Fifteenth Amendment to enforce the guarantees of Section 1, Congress may proscribe procedures with respect to voting that have discriminatory effects, whether or not those procedures are judicially determined to constitute violations of Section 1*

Section 1 of the Fifteenth Amendment guarantees that "[t]he right of the citizens of the United States to vote shall not be denied or abridged by the United

States or any state on account of race, color, or previous condition of servitude." As this Court observed in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 325, it is settled law that this guarantee is self-executing. If Congress, in enacting legislation pursuant to its powers under Section 2 "to enforce this article by appropriate legislation," were confined to prohibiting those practices that a court would determine violative of Section 1, it would be confined to doing (through the provision of alternative remedies, for example) what the enacters of the Amendment have already accomplished in Section 1. The decisions of this Court counsel that Congress is not so confined in exercising its powers under Section 2.

The seminal case defining the power of Congress to effectuate the guarantees of the Civil Rights Amendments, *Ex parte Virginia*, 100 U.S. 339 (1879), concerned the exercise of power under the Enforcement Clause (Section 5) of the Fourteenth Amendment; but this Court made it clear in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 326-327, that the powers of Congress under Section 2 of the Fifteenth Amendment, are no less broad. Thus the power available to Congress for the effectuation of Fifteenth Amendment rights is properly defined in the following words from *Ex parte Virginia*, *supra*, 100 U.S. at 345-346:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

More specifically, in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 333-334, this Court rejected the contention that because it had previously held, in *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959), that literacy tests are not *per se* violations of the Fifteenth Amendment, Congress is not empowered under Section 2 of the Amendment to compel states to suspend their use of such devices for a given period. Indeed, the very fact that the Court in *South Carolina* v. *Katzenbach* found it unnecessary to overrule *Lassiter* is largely dispositive of appellants' constitutional claims.[32] As this Court explained, 383 U.S. at 334, "Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants." Thus a state or municipality covered by Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b, could be forbidden to use a voting registration test even though it was fairly administered and had not been

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[32] The Court observed that the record showed that "in *most of the States* covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising Negroes * * *." 383 U.S. at 333 (emphasis added).

judicially determined to have been enacted with a discriminatory purpose. Significantly, the Act's coverage formula was designed to focus its applicability on areas where there was strong reason for a legislative presumption that substantial effects of intentional discrimination in violation of Section 1 of the Fifteenth Amendment persisted. Accordingly, even though the prohibited use of a test or device, or the prohibited change in electoral procedures, may not in themselves have been adopted with discriminatory purpose, their prohibition is an appropriate legislative means of preventing perpetuation of the effects of a pervasive pattern of intentional discrimination —and thus an appropriate exercise of the congressional power to enforce the guarantees of the Fifteenth Amendment. See also *Gaston County* v. *United States*, 395 U.S. 285 (1969).

Similarly, in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966), in considering a challenge to Section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. 1973b (e), which prohibited enforcement of a New York law making literacy in English a prerequisite for voting even for those New York residents from Puerto Rico who had completed six grades in an accredited Spanish-language Puerto Rican school, this Court held that Congress had properly used its powers under Section 5 of the Fourteenth Amendment in enacting Section 4(e) of the Act. The Court expressly rejected the contention that Section 4(e) "cannot be sustained as appropriate legislation to enforce the Equal Protection Clause unless the judi-

ciary decides—even with the guidance of a congressional judgment—that the application of the English literacy requirement prohibited by § 4(e) is forbidden by the Equal Protection Clause itself" (384 U.S. at 648). It was sufficient, the Court held, that a rational basis could be discerned for a congressional judgment that this prohibition was "a means of dealing with the evil" at which the Equal Protection Clause was aimed. *Id.* at 653. See also *Everard's Breweries* v. *Day*, 265 U.S. 545, 558-560 (1924) (Eighteenth Amendment).

More recently, in *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), this point has been reaffirmed in a context where the nexus of the legislative remedy with perpetuation of purposeful discrimination was considerably more attenuated than it is here. In one of several cases consolidated with the Oregon case, this Court unanimously rejected a challenge by the State of Arizona to the constitutionality of Section 201 of the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315, which imposed a five-year nationwide ban on literacy tests and similar requirements for registering to vote in state or federal elections. Arizona contended that neither its voting requirements nor its educational system, which—if discriminatory—might have made fairly enacted and administered tests discriminatory in effect, had been shown to discriminate against persons on the basis of race or color; and it argued that Congress had acted beyond its powers in enacting a law that would reach such voting requirements. *Oregon* v. *Mitchell, supra*, 400 U.S. at 233.

There was no single opinion for the Court, and Mr. Justice Douglas based his rejection of Arizona's challenge on the power of Congress, under Section 5 of the Fourteenth Amendment, to enforce the Equal Protection Clause. *Id.* at 144-147. In four separate opinions, the remaining eight Members of the Court, however, expressed the view that Congress had acted within its powers under Section 2 of the Fifteenth Amendment in enacting the ban. Mr. Justice Black noted that Congress could have decided that "discriminatory educational opportunities in both the North and the South," together with evidence that literacy tests "reduce voter participation in a discriminatory manner," warranted such a general prohibition as a means of enforcing the Fifteenth Amendment. *Id.* at 133. In a joint opinion, Justices Brennan, White, and Marshall noted that they did not question Arizona's claim that its own educational system had never been operated in a discriminatory manner, but they nonetheless found that Congress could prohibit Arizona's use of literacy requirements for voting because such requirements might reasonably be judged to perpetuate the effects of racial discrimination in schools elsewhere, where some of Arizona's potential voters had been educated. *Id.* at 233-234. Mr. Justice Stewart, joined by the Chief Justice and Mr. Justice Blackmun, noted by reference to *Lassiter* v. *Northampton County Board of Elections*, *supra*, and *Gaston County* v. *United States*, *supra*, that Congress has authority under section 2 of the Fifteenth Amendment to proscribe literacy tests that perpetuate the effects of past discrimination even though such tests

might survive a direct constitutional challenge under the Fifteenth Amendment. *Id.* at 293. Finally, Mr. Justice Harlan observed (400 U.S. at 216; footnote omitted):

> Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application either conscious or unconscious. This danger of violation of § 1 of the Fifteenth Amendment was sufficient to authorize the exercise of congressional power under § 2.

Just as literacy tests may "lend themselves" to discriminatory application, so changes in electoral procedures that enhance the power of a racial majority in a given community to deprive members of a racial minority in that community of any realistic opportunity to elect the candidates they support "lend themselves" to discrimination. Congress could rationally conclude that assuring protection of Fifteenth Amendment rights in areas with a history of racial discrimination in matters pertaining to voting, required, for a limited time, a prohibition on the use of procedures such as these that have a racially discriminatory impact, whether or not invidious racial purpose, or lack thereof, in their enactment may be demonstrated in each particular case.[33] In enacting a

[33] As the district court pointed out, "the frequent lack of state legislative histories and the unreliability of other means of ascertaining legislative intent" would make it particularly onerous to have to investigate purpose in order to preclear

limited extension of the Voting Rights Act in 1975, Congress took note of the fact that although much progress had been made during the preceding decade in which the Act had been in effect, that progress had been "modest and spotty" and that the "continuing need for this preclearance mechanism" was evidenced by the fact that "[a]s registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength." S. Rep. No. 94-295, 94th Cong., 1st Sess. 15, 16 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 7, 10 (1975). Among the electoral changes having such effects, it mentioned annexations of predominantly white areas and the imposition of majority vote requirements and staggered terms. S. Rep. No. 94-295, *supra*, at 16-17; H.R. Rep. No. 94-196, *supra*, at 10.

Section 5 as construed to prohibit the use of such new procedures thus serves the congressional purpose,

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voting changes under Section 5 (J.S. App. 36b). The court's equation of the "effect" standard in Section 5 with an "irrebutable presumption" of invidious intent (*ibid.*) is unnecessary in light of Mr. Justice Harlan's theory that Congress may prohibit practices as to which there is a "risk" that they will violate Section 1 of the Fifteenth Amendment (*Oregon* v. *Mitchell*, *supra*, 400 U.S. at 216); but, in any event, such a presumption is not in itself unconstitutional as appellants suggest (Br. 27). This Court rejected a similar argument in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 330. And it has frequently recognized the need for legislatures to create classifications based on presumptions even where those classifications are imperfect. See, *e.g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 316 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 771-773 (1975).

described approvingly by this Court in *Beer* v. *United States*, 425 U.S. 130, 140 (1976), of "prevent[ing] States from 'undo[ing] or defeat[ing] the rights recently won' by Negroes." As this Court held in *Beer*, effectuating that purpose required that "no voting-procedure changes * * * be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" (*id.* at 141). If a separate inquiry into invidious intent were constitutionally required for every Section 5 preclearance, it would be impossible to achieve that goal of preventing retrogression and Congress would be severely disabled from securing the guarantees of the Fifteenth Amendment to members of groups long denied them.

2. *The Fifteenth Amendment prohibits electoral procedures enacted without official intent to discriminate that have the effect of enhancing purposeful private discrimination*

Appellants urge (Br. 47-53) that proof of a violation of the Fifteenth Amendment requires a showing of invidious purpose as well as of discriminatory effect. This Court has not specifically so held, although such an interpretation is consistent with its decisions under the Fifteenth Amendment, in most of which official discriminatory purpose has been "painfully apparent" (*Nevett* v. *Sides*, 571 F.2d 209, 220 (5th Cir. 1978), petition for cert. pending, No. 78-492). See, *e.g.*, *Guinn* v. *United States*, 238 U.S. 347 (1915); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Alabama* v. *United States*, 371 U.S. 37, aff'g

304 F.2d 583 (5th Cir. 1962). Even if the Court chooses, however, to reach the question whether the changes at issue in this case violate the Fifteenth Amendment, it need not decide whether a Fifteenth Amendment violation may be shown without demonstrating that the official action at issue is linked to purposeful racial discrimination. The changes at issue here enhance the power of purposeful private discrimination to exclude blacks from effective participation in the electoral process. Construing the Fifteenth Amendment to prohibit such official action is consistent with decisions of this Court.[34]

At least two decisions of this Court suggest that the element of purpose is present where the official action with respect to voting, although itself under-

[34] Although, as stated, the Court need not decide whether official action may be found to violate the Fifteenth Amendment on the basis of discriminatory effect alone, we note that the language of the Fifteenth Amendment—in particular its reference to denial or abridgement of the vote "on account of race, color, or previous condition of servitude"—resembles recent civil rights legislation prohibiting discrimination in specific types of activity. Phrases such as "because of race" or "on the ground of race" appearing in civil rights statutes have been held not to require a showing of specific racial impetus for measures that perpetuate or enhance the effects of earlier discrimination. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971); *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283, 1289-1290 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978) (*"Arlington Heights II"*). Thus, reading Section 1 of the Fifteenth Amendment to prohibit the implementation of measures having a racially disparate impact on the ability of racial minorities to participate fully and effectively in the electoral process would not unduly strain the language of the Amendment.

taken with benign purpose, interacts with purposeful private discrimination to accomplish a discriminatory result. In *Smith* v. *Allwright*, 321 U.S. 649 (1944), the Court reviewed a Fifteenth Amendment challenge to facially neutral state election laws that limited candidacy in the general election to the victors in authorized primaries—among them the state Democratic primary, in which blacks were denied the right to vote. The Court concluded that the state election laws effectively endorsed private discrimination by the political party, observing that the right to vote may not be "nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election" (321 U.S. at 664).

In *Terry* v. *Adams*, 345 U.S. 461 (1953), the Court struck down as violative of the Fifteenth Amendment a system in a Texas county by which a racially exclusive private club preselected candidates prior to the state-wide primary; whites then voted as a bloc and their candidate "invariably" won in the primary and subsequent general election (345 U.S. at 483 (opinion of Clark, J.)). While the eight Justices who agreed that this arrangement contravened the Fifteenth Amendment reached that result by somewhat different routes,[35] the unifying principle to be gleaned from the case is that state election procedures may not create an opportunity for racial

[35] Mr. Justice Black wrote for himself and Justices Douglas and Burton; Mr. Justice Frankfurter concurred separately; and Mr. Justice Clark wrote for himself, the Chief Justice, and Justices Reed and Jackson.

bloc voting to operate in a way that effectively denies black voters meaningful participation in the electoral process.

Thus, decisions of this Court recognize that electoral procedures that allow private intentional discrimination to abridge the voting rights of black citizens are contrary to the guarantees of the Fifteenth Amendment.[36] Because the 1966 City Charter amendments and the annexations at issue create the opportunity for such private discrimination to prevent blacks from fully participating in the electoral process (see pages 28-42, *supra*), the Fifteenth Amendment prohibits their implementation.

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[36] *James* v. *Bowman*, 190 U.S. 127 (1903); *United States* v. *Harris*, 106 U.S. 629 (1882); and *United States* v. *Reese*, 92 U.S. 214 (1875), of course predate *Smith* v. *Allwright*, *supra*, and *Terry* v. *Adams*, *supra*, and thus provide no support for attacking the principle embodied in *Smith* and *Terry*. In any event, their holdings are not contrary to our reading of the two later cases. The conduct punished under the statute at issue in *Harris* did not relate to voting, and the passage quoted from *Harris* by appellants (Br. 57-58) simply relied on *Reese*. In *Reese*, the Court found the statute in question beyond the power of Congress because it appeared to reach any "wrongful" interference "to prevent the exercise of the elective franchise without regard to * * * discrimination [on account of race, color, or previous condition of servitude]." 92 U.S. at 220. In *James*, the Court struck down a statute that imposed criminal penalties on private citizens without reference to any state action. The Court held that a "statute which purports to punish *purely* individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress." 190 U.S. at 139 (emphasis added).

B. Section 5 Is Not An Unconstitutional Infringement Of Rights Guaranteed To The States Or Private Citizens Under The First, Fifth, Ninth, And Tenth Amendments

Appellants and the State of Mississippi as *amicus curiae* attempt to revive contentions rejected by this Court in *South Carolina* v. *Katzenbach*, *supra*, in arguing that Section 5 of the Voting Rights Act of 1965 is unconstitutional because it violates principles of federalism.

The power granted to Congress under Section 2 of the Fifteenth Amendment to enforce the provisions of Section 1 necessarily permits it to limit the authority of a state over voting and election procedures when the state's action may encroach upon rights guaranteed by that Amendment. *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 325; *Ex parte Virginia*, *supra*, 100 U.S. at 346-348. This Court has consistently recognized that the Civil War Amendments changed principles of state sovereignty reflected in the Tenth and Eleventh Amendments, and has upheld congressional action that, in the course of enforcing the Civil War Amendments, has intruded into "spheres of autonomy previously reserved to the States" (*Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455 (1976), citing *South Carolina* v. *Katzenbach*, *supra*, and *Mitchum* v. *Foster*, 407 U.S. 225 (1972)). See *Ex parte Virginia*, *supra*, 100 U.S. at 346-348. Speaking of the permissible reach of the Fourteenth Amendment in regulating state action, the Court used language in *Fitzpatrick*, *supra*, that applies with

equal force to the scope of the Fifteenth Amendment (427 U.S. at 456):

> When Congress acts pursuant to § 5 [of the Fourteenth Amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for * * * suits against States or state officials which are constitutionally impermissible in other contexts.

Appellants (Br. 74-75) and the State of Mississippi (Miss. Br. 9, 21) rely heavily on *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), a case that concerned the extension of federal wage and hour regulations to state and local governments. As the district court noted (J.S. App. 38b), however, the holding of *National League of Cities* is carefully limited to regulations enacted under the Commerce Clause (426 U.S. at 851-852), and, significantly, the Court expressed no opinion as to "whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as * * * § 5 of the Fourteenth Amendment" (*id.* at 852 n.17).

The distinction between the power of Congress under the Commerce Clause and its power under the

Civil War Amendments rests on the nature of the constitutional grant involved. The power to regulate interstate commerce is the power "to prescribe the rule by which commerce is to be governed" (*Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)), and necessarily embraces the enactment of laws regulating individual conduct that is subject to both state and federal sovereignty (*National League of Cities*, *supra*, 426 U.S. at 845). A more exclusive grant of authority is conferred by the Fourteenth and Fifteenth Amendments, which directly prohibit certain activities by the States and further authorize Congress to enact appropriate legislation for their enforcement. Unlike the Commerce Clause, those amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." *Ex parte Virginia*, *supra*, 100 U.S. at 345. What Congress is authorized to enforce are prohibitions directed to the States that restrict state power. As this Court expressly stated in *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 324, 325:

> As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.
>
> * * * The gist of the matter is that the Fifteenth Amendment supersedes contrary exertions of state power.

South Carolina v. *Katzenbach* and *Fitzpatrick* v. *Bitzer*, rather than *National League of Cities*, thus provide the pertinent guidance concerning the power

of Congress to regulate state conduct under the Fifteenth Amendment. See also *Firefighters Institute for Racial Equality* v. *City of St. Louis*, 549 F.2d 506, 510 n.5 (8th Cir.), cert. denied *sub nom. City of St. Louis* v. *United States*, 434 U.S. 819 (1977); *Blake* v. *City of Los Angeles*, 595 F.2d 1367, 1373 (9th Cir. 1979), petition for cert. pending, No. 79-54.

Appellants urge that the Voting Rights Act has outlived its usefulness because the "emergency conditions" that prompted its passage no longer obtain, and that its intrusion into state and local regulation of voting procedures can therefore no longer be justified (Br. 71-73). But while it cannot be denied that dramatic improvements were made between 1964 and 1975 in black access to the electoral process (Br. 73 n.64), that success is directly attributable to the Voting Rights Act, and Congress found sufficient discrimination remaining in 1975 to warrant extending the operation of the Act for seven additional years. See H.R. Rep. No. 94-196, *supra*, at 7-11. Moreover, the determination of when the protections of the Act should be permitted to lapse is peculiarly within the expertise of Congress, armed with information from the Department of Justice and other sources concerning enforcement experience under the Act. The argument by appellants and the State of Mississippi that this Court, rather than Congress, should decide the lifespan of the Voting Rights Act is contrary to this Court's well-settled and salutary practice of deferring to the legislative judgment in such matters. See, *e.g.*, *South Carolina* v. *Katzenbach*, *supra*, 383 U.S. at 308-315.

Appellants also contend that Section 5 is unconstitutional because compliance with it is "intrusive and burdensome" (Br. 79-82) and because it subjects the States to government by the Attorney General's "administrative fiat" (Br. 82-83) and imposes "political orthodoxy" on covered jurisdictions (Br. 83-84). Similar claims were raised in *South Carolina* v. *Katzenbach*, *supra*, and were rejected by this Court. Appellants have offered no substantial reason for this Court to reconsider such contentions.

Finally, the individual appellants claim that their First, Fifth, Ninth, and Tenth Amendment rights as private citizens have been abridged because no elections have been conducted in Rome since 1974 (Br. 84-89). But Section 5 neither prevents municipalities from holding elections nor restricts private expression of speech protected by the First Amendment. Section 5 helps to insure that when elections are held, members of any particular racial group will not be deprived of an opportunity for full participation, and no person's participation will be limited on racial grounds. It thus infringes no cognizable right of the individual appellants.

In any event, the district court correctly found that the City's delay in holding municipal elections is self-imposed (J.S. App. 43b). Section 5, by its terms, contemplates that when proposed election changes are not precleared, existing procedures remain in effect, and elections are governed by, and should be held under, those procedures. Following the Attorney General's refusal to preclear the 1966

changes, the City could still have conducted elections under pre-existing law—indeed it was obligated by Georgia law to do so.[37] Instead, it decided to allow the incumbents to remain in office indefinitely throughout the pendency of this suit. It is the appellant officials who are responsible for seeing to it that elections are conducted; the failure to hold elections is not the fault of the Attorney General or the district court.[38]

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[37] The law existing on November 1, 1964, which continued in effect when preclearance was denied, required city commissioners and school board members to be elected every four years (1918 Ga. Laws 818, 861). However, when the City's Section 5 submission did not succeed, the City failed to comply with this obligation and did not conduct new elections.

[38] Appellants argue (Br. 85-86) that while other changes failed, the reduction of wards from nine to three was precleared, and that since the old law, which established nine wards and nine commissioners, was still in effect, the new law effectively reduced the number of commissioners from nine to three. A three-man commission, they argue, could not govern, given the requirement of five for a quorum. In fact, the new three-ward system established that three commissioners were to be elected from each ward. Since the Attorney General could not and did not object to the requirement that each commissioner reside within the ward from which he was elected, the City could still have elected nine commissioners, three from each ward, as long as the features to which the Attorney General had objected—majority vote, staggered terms, numbered posts—were not implemented. (Although the Attorney General objected to the annexations in the context of at-large elections with a residency requirement (see pages 12-13, and note 14, *supra*), the residency requirement itself did not run afoul of Section 5 because its enactment predated the Voting Rights Act.) In other words, an election for a nine-member city commission readily could have been conducted under the effective portions of pre- and post-1964 law—*i.e.*, three members from each ward, elected at-large by plurality vote. Under effective parts of the election code a Board of Education election could have been held to choose two members from each ward, at-large, by plurality vote. If the City believed all new changes were "inextricably interwoven" (Plaintiffs' Motion for Interim Relief 2), and therefore ineffective if not precleared together, it could have relied entirely on pre-1964 procedures for new elections.

The City also contends it could not have held those elections because to do so would have cut short the staggered terms of some officials elected in previous elections. Those officials were in fact elected in violation of Section 5; when preclearance was not secured, new elections could have been held reverting to old, concurrent terms. *Berry* v. *Doles*, 438 U.S. 190, 193 (1978). Although the Attorney General offered to preclear quickly any technical changes necessary to permit the City to conduct elections under existing effective procedures (J.S. App. 43b), the City did not pursue this possibility (*ibid.*).

IV. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE ELECTORAL CHANGES AND ANNEXATIONS AT ISSUE HERE HAVE NOT BEEN PRECLEARED BY THE ATTORNEY GENERAL

A. The Electoral Changes Were Not Precleared In 1968

Appellants argue (Br. 90-93) that the 1968 preclearance of the Georgia Municipal Election Code, Title 34A of the Code of Georgia, effectively precleared the 1966 changes to the City's charter. The district court correctly rejected that argument (J.S. App. 23b). In its 1968 submission, the State did not "submit" the changes as they applied to the City of Rome. There was no explanation of how, or even

whether, the City's procedures were changed. In order to "submit" a new procedure, the change must be clearly explained to the Attorney General, 28 C.F.R. 51.10; he cannot reasonably be held to be put on notice of the election procedures for every municipality when an act with statewide effect is submitted. As this Court held in *United States* v. *Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 137-138 (1978), preclearance cannot occur until the particular change has been submitted to the Attorney General and he has been afforded an opportunity to assess its purpose and its effect on minority voting in *that* jurisdiction.

In any event, the 1968 Municipal Election Code made no actual change in the City's procedures. The 1968 law gave municipalities the option to create numbered post and majority vote requirements (J.S. App. 1d). Since those provisions did not require the adoption of either, they did not change the City's procedures.[39]

B. The Attorney General Did Not Effectively Preclear The Changes By An Untimely Response To A Request For Reconsideration

Appellants also contend (Br. 93-96) that the Attorney General's response to the City's May 24, 1976,

[39] The relevant Code section (Ga. Code Ann. § 34A-1407 (1970)) provided that unless a municipality's charter "as now existing or as amended subsequent" to the Act required plurality voting, majority-vote elections should be used. In 1968, the City's charter still required plurality voting; the 1966 change to majority voting had not been precleared and was therefore ineffective.

letter requesting that he reconsider his objections to the electoral changes was late and that the Attorney General thereby in effect gave his approval to the submission upon reconsideration. This argument rests on a challenge to the Attorney General's reasonable construction of his own regulations with respect to time limitations on consideration of requests for reconsideration of objections interposed under Section 5.

In *Georgia* v. *United States*, 411 U.S. 526, 541 (1973), this Court approved, as "wholly reasonable and consistent with the Act," the Attorney General's regulation (28 C.F.R. 51.18(a)) providing that the statutory 60-day period for initial consideration of a Section 5 submission (42 U.S.C. 1973c) is tolled when the Attorney General finds it necessary to request additional information from the submitting authority and that the period starts anew when he receives the requested information. Appellants' contention concerns not that statutory period for initial review of a Section 5 submission but rather a 60-day period the Attorney General has imposed upon himself for reconsideration, at the behest of a submitting authority, of an objection he has timely interposed (28 C.F.R. 51.3(d), 51.24). Appellants contend that that 60-day period should run from the date of its initial request on May 24, 1976, but the Attorney General computed the time as running from July 14, 1976, when the City voluntarily supplemented its request with two additional affidavits. The Attorney General declined to withdraw his objection on August 12,

1976, within 60 days of the latter submission but not of the former.[40]

As the district court correctly held (J.S. App. 27b-28b), it was reasonable for the Attorney General to treat this situation by analogy to that in which a submitting authority sends additional information at the Attorney General's request and to restart the period upon receipt of the additional material. This holding does not give the Attorney General unlimited or unfair power to delay decisions on Section 5 submissions since the rule applies only (1) when a submitting authority, having received a timely decision on its submission, chooses to seek reconsideration of that decision and (2) when that authority decides to submit the evidence bearing on the reconsideration decision in a piecemeal fashion. The contrary rule for which appellants contend would substantially impair the reconsideration process, since it would permit jurisdictions to submit additional material late in the 60-day period, when it could not be properly assessed for lack of time.[41] Since appellants volun-

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[40] As appellants point out (Br. 94), those regulations provide for an additional 15 days for considering requests for reconsideration following a conference held at the submitting authority's request, but are silent as to the effect of an authority's uninvited submission of additional material for the Attorney General to examine before making his decision on reconsideration, such as occurred here.

[41] *Garcia* v. *Uvalde County*, 455 F.Supp. 101 (W.D. Tex. 1978) (three-judge court), aff'd mem., No. 78-580 (Jan. 8, 1979), is not to the contrary. That case concerned "repeated requests for additional information" (455 F.Supp. at 104), by each of which the Attorney General sought to postpone the start of the statutory 60-day period for consideration of Section 5 submissions. The district court held only that once the Attorney General has received from the submitting authority a response to his first request for additional information and the submission is complete according to his regulations, he may not further postpone the start of the 60-day period by making additional requests. 455 F.Supp. at 106.

tarily chose to supplement their submission for reconsideration, they should not be heard to claim that the Attorney General erred in treating their unsupplemented submission as incomplete and their supplemental submission as entitled to full consideration under the regulation.

In any event, even if the Attorney General had not timely complied with the regulations governing requests for reconsideration, the effect would not have been to preclear the proposed changes. The regulations provide that within 60 days of the request he will "decide" and will notify the requesting authority "of his decision to continue or withdraw an objection," but they do not state that the objection will be deemed withdrawn if he does not act on the request within 60 days.[42] The Act, of course, specifies

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[42] 28 C.F.R. 51.3(d) provides:

> When the Attorney General objects to a submitted change affecting voting, and the submitting authority seeking reconsideration of the objection brings additional information to the attention of the Attorney General, the Attorney General shall decide within 60 days of receipt of a request for reconsideration (provided that he shall have at least 15 days following a conference held at the

that the proposed changes cannot take effect unless precleared, and the Attorney General's objection here was concededly interposed during the 60-day statutory time period. That objection remained in effect unless and until it was withdrawn. A failure by the Attorney General to respond to appellants' request for such withdrawal within the time prescribed by the regulations might have entitled appellants to seek a court order requiring prompt consideration by him of their request, but there is no basis for holding that it would have abrogated the protections of the Act. Nor would there have been occasion for the district court in the present proceeding to afford collateral relief. Cf. *Morris* v. *Gressette*, 432 U.S. 491 (1977).

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submitting authority's request) whether to withdraw or to continue his objection.

28 C.F.R. 51.24 provides:

> An objection shall be withdrawn if the submitting authority can produce information not previously available to it which satisfies the Attorney General that the change does not have a racially discriminatory purpose or effect. The Attorney General shall notify the submitting authority within 60 days of the request for reconsideration (provided that the Attorney General shall have at least 15 days following any conference that is held in which to decide) of his decision to continue or withdraw an objection, giving the reasons for his decision. A copy of the notification shall be sent to any party that has commented on the submission or has requested notice of the Attorney General's action thereon.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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SEPTEMBER 1979

APPENDIX

The Civil Rights Division of the Department of Justice has surveyed the nine states covered in their entirety under the Voting Rights Act to determine the total number of counties, municipalities, and specialized units of government (*e.g.*, school districts) in those states that have authority to make changes in election procedures or carry out activities within the purview of Section 5.[1] Reproduced below is a table showing the totals for each of those states.[2]

State	Counties	Municipal Govt's	Other
Ala.	67	410	166
Alas.	11	112	51
Ariz.	14	70	236
Ga.	159	530	188
La.	64	299	66
Miss.	82	283	153
S.C.	46	264	92
Tex.	254	1066	2109
Va.	96	229	170
Total:	793	3263	3231

GRAND TOTAL: 7,287

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[1] Alaska and Arizona are covered under the formula added by Title II of the 1975 amendments to the Voting Rights Act, Pub. L. No. 94-73, 89 Stat. 400 *et seq.*

[2] The figures were derived from U.S. Census data and from telephone interviews with state government officials in these states and Dr. Vance Grant, Chief of the Statistical Information Center, National Center for Education Statistics, Department of Health, Education and Welfare.

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1840

CITY OF ROME, BRUCE HAMLER, and H. F. HUNTER, JR.,
Appellants,

v.

UNITED STATES OF AMERICA, BENJAMIN R. CIVILETTI, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
Appellees.

On Appeal From the United States District Court For the District of Columbia

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1840

CITY OF ROME, BRUCE HAMLER, and H. F. HUNTER, JR.,
Appellants,

v.

UNITED STATES OF AMERICA, BENJAMIN R. CIVILETTI, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
Appellees.

On Appeal From the United States District Court For the District of Columbia

---

APPELLANTS' REPLY BRIEF

In this Reply Brief Appellants restate the issues before this Court, reply to several recurring positions of the brief submitted by Appellees (the "Appellees' Brief"), and reply, *seriatim*, to each portion of Appellees' Brief.

I.

THE PRINCIPAL ISSUES BEFORE THE COURT

The principal issues before the Court relate to the impact of Section 5 of the Voting Rights Act of 1965,

as amended (the "Act"), upon a political subdivision that has proved the absence of any discriminatory purpose in the adoption of certain electoral provisions and annexations. A case of this nature has never been before the Court.

The Appellees have made the "primary submission," Appellees' Brief at 51, that Congress may prohibit electoral changes whether or not such changes are, in themselves, constitutional violations. In this regard, Judge McGowan noted in the opinion of the District Court that Rome's argument is "squarely presented for decision on the facts of this case." Juris. State. at 32b n.69. Thus, this case provides an opportunity for determination of the scope of congressional power under Section 2 of the Fifteenth Amendment.

II.

RECURRING POSITIONS OF APPELLEES

1. *Construction of the Court's Prior Decisions.* Appellees have indicated, both directly and by inference, that the issues before this Court are matters of well settled law. Appellees' Brief at 2, 18, 24, 26-27, 49-50, 52-55. In contrast to Appellees' assertion that these matters are "clear and well established," *id.* at 27, and that there exists a "settled and well-reasoned body of case law interpreting Section 2 of the Fifteenth Amendment and the Voting Rights Act," *id.* at 50, Mr. Justice Marshall, dissenting in *Beer* v. *United States,* 425 U.S. 130, 148 n.4 (1976), observed:

> The Court's decisions relating to the relevance of purpose and/or effect analysis in testing the constitutionality of legislative enactments are somewhat less than a seamless web. The possible theoretical approaches are three: (1) purpose alone is the test of unconstitutionality, and effect is irrelevant, or relevant only insofar as it sheds light on purpose; (2) effect alone is the test, and purpose is irrelevant; and (3) purpose or effect, either alone or in combination, is sufficient to show unconstitutionality. At various times in recent years the Court has seemed to adopt each of these approaches.

The court below indicated that "[w]hether the Fifteenth Amendment reaches only purposeful discrimination is an important and unsettled constitutional question." Juris. State. at 33b. Demonstrative of the unsettled nature of these issues are the constructions by Appellants and Appellees of this Court's decisions in *Oregon* v. *Mitchell,* 400 U.S. 112 (1970) and *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966). *Compare* Appellants' Brief at 61-66 *with* Appellees' Brief at 54-57. Moreover, Appellees' suggestion that the construction of Section 5 is well settled is incorrect because this Court has not previously considered the application of Section 5 to a political subdivision found innocent of purposeful discrimination. Hence, the cases in Appellees' Brief at 26-27, all decided before this Court's decision in *Washington* v. *Davis,* 426 U.S. 229 (1976), are distinguishable.

2. *Scope of Appellants' Constitutional Attack.* Appellees appear to suggest that Appellants challenge the constitutionality of the entire Act. Appellees' Brief at 22, 49-50, 66. To the contrary, Appellants question the construction and constitutionality of Section 5 of the Act in the context of a political subdivision found innocent of any purposeful discrimination with respect to its political affairs. App. at 171; Appellants' Brief at 4-5; Juris. State. at 5.

3. *The "Freezing" of Rome's Elections.* Appellees urge that the District Court correctly found that the freezing of elections in the City of Rome is "self-imposed." Appellees' Brief at 67, 68 n.38. Appellees' argument is based upon (1) disregard for this Court's interpretation of Section 5 at the time of enactment of the changes here at issue, Appellants' Brief at 16; (2) failure to acknowledge that the electoral changes here at issue were precleared by virtue of the preclearance of the Georgia Municipal Election Code in 1968, *id.* at 90-93; and (3) disregard of the fact that Rome's changes were validly enacted laws of the State of Georgia. App. at 82-85; Appellants' Brief at 84 n.75.

Specifically, Appellees urge that the portion of the political change which established the number of representatives from each of the three "new" wards could have been utilized together with the "old" plurality vote requirement; however, provisions for number of representatives to be elected from each ward are contained in the very laws that have not been precleared by the Attorney General. Juris. State. at 6e-7e, 10e-11e. The questionable validity of elections held in such a chaotic circumstance is apparent. Appellees also assert, without citation, that the "new" three-ward system provided for three commissioners from each ward. This is erroneous: the law reducing the number of wards did *not* establish the number of commissioners. App. at 62, 67-68, 209-210 n.6.

Appellees correctly acknowledge that city officials were obligated to conduct elections according to Georgia law. They fail to recognize, however, that Rome's compliance with precleared provisions of the Georgia Municipal Election Code fulfilled such obligation.

In any event, the District Court found that in the circumstances elections are "technically infeasible." Juris. State. at 42b-43b. See also *Berry* v. *Doles,* 438 U.S. 190, 197 n.1 (1978) (Powell, J., concurring); *Beer* v. *United States,* 425 U.S. 130, 138 (1976); *Perkins* v. *Matthews,* 400 U.S. 379, 395-96 (1971); *Allen* v. *State Board of Elections,* 399 U.S. 544, 572 (1969).

4. *Proportional Representation.* Appellees assume throughout their argument that Section 5 of the Act requires the Attorney General to structure the political system of a municipality in order to insure proportional racial representation. This attitude is demonstrated by Appellees' analysis of the unsuccessful campaign of Reverend Hill for the Rome Board of Education in 1970, Appellees' Brief at 7-8. Appellees assume that the inexorable political choice of the black citizens of Rome would be the election of a black representative. *See* Appellees' Brief at 11, 32-33, 35.

Appellees' position is contrary to law which does appear to be well settled: "[I]t is not enough [to sustain constitutional claims] that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." *White* v. *Regester,* 412 U.S. 755, 765-66 (1973). This constitutional standard is equally applicable to the operation of Section 5. Mr. Justice Stewart, writing for the Court in *Beer* v. *United States,* 425 U.S. 130, 136 n.8 (1976), observed: "This Court has, of course, rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population. See *Whitcomb* v. *Chavis,* 403 U.S. 125 . . . ."

The position of the Appellees, and the effect of the District Court's judgment, is that a state or municipality seeking to effect salutory political changes—for example, annexations to provide needed services or to solve a financial exigency—is prohibited from doing so unless identifiable racial groups are assured proportional representation by group members. Such a position is contrary to the Fifteenth Amendment, the language of Section 5, and prior decisions.

Appellees also make certain value judgments with respect to the system of governance chosen by the people of Rome. For example, Appellees assert that the Assistant Attorney General indicated to Rome that if it undertook to use a plurality win method of election or "fairly" drawn "single-member districts," he would reconsider his position. Appellees' Brief at 12 n.13. Appellees also undertake to suggest, in detail, alternative political structures for the City of Rome. Appellees' Brief at 41-42. The views of the Department of Justice as to the appropriate structure for Rome's government have been advanced only by the Department of Justice. No citizen of Rome has instituted an action questioning the propriety of the changes or sought to intervene in this action. Also, the majority vote requirement, which Appellees find particularly objectionable, Appellees' Brief at 17, is identical to the majority vote feature precleared as part of the 1968 Georgia Municipal Election Code and the 1964 Georgia Election Code.

A political orthodoxy as to the "proper" structure of state and local government is being imposed by the Attorney General. The imposition of such a policy, where there is no constitutional violation, represents

an attempt to "restructure local governmental entities" and "to mandate a particular method or structure of state or local" governmental affairs that was indicated to be an abrogation of the principles of Federalism in *Milliken* v. *Bradley*, 433 U.S. 267, 291 (1977). See App. at 178.

5. ***The Absence of Racial Animus.*** Appellees acknowledge the finding of the District Court that the political changes and annexations here at issue were enacted without any racially discriminatory purpose. Appellees' Brief at 17. Nevertheless, Appellees imply that racial animus exists in the political affairs of Rome.

Rome's political changes, utilized by many other municipal governments, and Rome's annexations, made as a result of the natural growth and development of the City, relate to the "right to vote" only by reason of Appellees' belief that racial groups have a right to achieve proportional representation. There is no racial discrimination in Rome in the conduct of voter registration or elections. The uncontradicted evidence indicates that no test or device, including a literacy test, has been utilized in Rome for at least forty years. Juris. State. at 6b and footnotes contained therein. Moreover, the District Court made specific findings with respect to the absence of any racial discrimination in the electoral processes of Rome and the conduct of city government. Appellants' Brief at 6-7. Appellees nevertheless argue that the effect of the present electoral changes and annexations "would be to abridge the right to vote on account of race or color." Appellees' Brief at 24.

Similarly, Appellees' treatment of Rome's annexations implies racial animus. According to Appellees, individual consideration of each annexation would permit "substantial diminutions of black voting strength." Appellees' Brief at 37. The necessary implication of this argument is that Rome, and similar subdivisions, might undertake to discriminate officially through piecemeal annexations. Such a supposition is unsupported by the record or reason.

Appellees' attitude is also demonstrated by their remarkable use of the "white primary" cases, *Smith* v. *Allwright*, 321 U.S. 649 (1944) and *Terry* v. *Adams*, 345 U.S. 461 (1953). "The changes at issue here enhance the power of purposeful private discrimination to exclude blacks from effective participation in the electoral process." Appellees' Brief at 60. There is no evidence in the record to suggest the existence of any private discrimination in Rome to exclude blacks from effective participation in electoral processes, and, indeed, the findings of the court below are expressly contrary to such a supposition. Appellants' Brief at 6-7. In order for these cases to have any applicability to the changes here at issue, there must be an assumption that such private discrimination exists in connection with a private organization, system, or practice that is an agent of the City. There has been no finding of any such agency relationship. The employment of such authorities by the Appellees represents a categorical assumption that the white citizens of Rome are guilty of purposeful racial discrimination because they reside in one of the States covered by the Act, notwithstanding clear evidence to the contrary.

III.

THE CONSTRUCTION OF SECTION 5 OF THE ACT

Appellees have eschewed the analysis of the District Court that Congress established in Section 5 an "irrebuttable presumption" of "purpose" from "effect." Appellees' Brief at 57-58 n.33. In this regard, Appellants again submit that the language of Section 5, together with the legislative history of the inclusion of the "purpose" standard and the appropriate constitutional tests, requires a construction of Section 5 that gives independent significance to the "purpose" standard. "Purpose" should first be analyzed and only if the "purpose" of the changes at issue is unclear or unlawful should the "effect" of the changes be reviewed.

Appellants' proposed construction is said to be "unsound" because it ignores the negative nature of the Section 5 language. Appellees' Brief at 25 n.18. The negative nature of Section 5 merely establishes that the burden of proving the constitutionality of the changes is placed upon the submitting jurisdiction.

Appellees contend that the use of the conjunction "and" in Section 5 requires that preclearance plaintiffs prove not only an absence of discriminatory intent, but also an absence of discriminatory effect, before changes or annexations may be implemented. It is suggested that the alternative conjunction "or" would have been used if the construction proposed by Appellants had been intended. The use of "and," however, sets forth the appropriate constitutional standard. By including a requirement of purpose after the initial drafting of Section 5, Appellants' Brief at 26-27, it appears that an effort was made to parallel the language of Section 5 to the constitutional test.

The original version of Section 5 (Section 8 of S. 1564 and H.R. 6400) required a showing only of the absence of "effect." It is unlikely that, in the process of amending the more stringent original proposals, the members of Congress sought to restrict the preclearance standard by adding a requirement of "purpose." It is more likely that "purpose" was included because changes were to be precleared if they met the recognized constitutional standard. *See South Carolina* v. *Katzenbach,* 383 U.S. at 334.

Appellees suggest that because the opinion in *City of Richmond* v. *United States,* 422 U.S. 358 (1975), looked first to the effect of the proposed annexations and then to their purpose, the Court "expressly recognized that Section 5 imposes a dual requirement for preclearance of voting changes . . . ." Appellees' Brief at 26. The Court found that the black population of Richmond was reduced from fifty-two percent to forty-two percent, *id.* at 371-72, but did not find that this impact was an "effect prohibited by § 5," *id.* at 372. In holding that an "effect prohibited by Section 5" did not exist in Richmond and remanding for further examination of the "purpose" issue, this Court certainly did not hold that Congress proscribed, in Section 5, political changes and annexations having an impact but not enacted with discriminatory purpose. Indeed, Appellants' proposed construction of Section 5 is consistent with this holding, because Appellants argue that "purpose," not "effect," is the essential element of the standard. The Court's remand also seems to suggest that "purpose" is essential.

City of Richmond demonstrates that Rome's electoral changes and annexations do not have the type of "effect" proscribed by Section 5. A proscribed effect

was not found in *Richmond* even in the face of findings that the black citizens of Richmond would "command fewer seats on the city council . . . [and that] the annexation will have effected a decline in the Negroes' relative influence in the city." 422 U.S. at 371. *A fortiori,* no proscribed "effect" exists in Rome because the District Court found that black citizens "often hold the balance of power in Rome elections" and that the black community "if it chooses to vote as a group, can probably determine the outcome of many if not most contests." Juris. State. at 55b. 8b.

Appellants have established, under the criteria approved by this Court in *Zimmer* v. *McKeithen,* 485 F. 2d 1297 (5th Cir. 1973), *aff'd sub nom. East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976), that there has been no dilution of the vote of the black citizens in Rome by reason of the electoral changes and annexations. Thus, under *City of Richmond,* there has been no "effect prohibited by § 5." Appellees assert, Appellees' Brief at 33-34, that Rome omitted discussion of the "enhancing factors" of *Zimmer,* and, thus, Appellees assume the existence of *Zimmer's* primary factors, directly contrary to the findings of the court below. In any event, there is no "anti-single shot" voting provision; there has been no showing that "large districts" exist in Rome, and Rome's ward configuration was precleared by the Attorney General. Moreover, if the residency requirement objected to by the Attorney General had been precleared, there would not be a "lack of provision for at-large candidates running from particular geographic subdistricts" with respect both to the Board of Education and the City Commission. The suggestion by the Appellees that a majority vote requirement is a primary *Zimmer* factor is con-

trary to the holding in *Zimmer*. Moreover, such a majority vote requirement has been precleared by the Attorney General with respect to the 1968 Georgia Municipal Election Code and the 1964 Georgia Election Code.

Appellees have suggested a third interpretation of the effect of Rome's annexations upon the voting power of black citizens. Appellees' Brief at 38 n.26. *Compare* Juris. State. at 6b *with* Juris. State. at 52b-53b. The result of Appellees' calculations is an alleged reduction of the relative percentage of black voters by one percent and an increase in the relative percentage of white voters by one percent, "resulting in a total difference of two percent." The findings of the court below, however, indicate that there was an increase in the relative percentage of black voters, Juris. State. at 6b; Appellants' Brief at 14. Under any of the calculations of alleged "effect" made in this case, there has not even been a demonstration of the type of impact found in *City of Richmond not* to constitute a proscribed "effect". *See Brief Amicus Curiae Pacific Legal Foundation In Support of Appellant City of Rome* at 4-5.

All of Appellees' arguments regarding the existence of a prohibited effect presume the existence of racial bloc voting in Rome even though Appellees admit that no statistical demonstration of bloc voting can be made. Appellees' Brief at 8. In the absence of such proof, Appellees rely on a "prediction" based upon Floyd County voting data from a single statewide Democratic primary in 1968 between the former governor and three-term United States Senator Herman Talmadge and Maynard Jackson, who was making his first bid for public office. In view of the long incumbency of Herman Talmadge, the "prediction" of bloc voting is

without probative value, and the findings of the District Court are clearly erroneous. *See* App. at 224-288.

IV.

THE CONSTRUCTION OF SECTION 4 OF THE ACT

Appellees have failed to respond to Appellants' structural analysis of Section 4 and have failed, specifically, to respond to the common reference in Sections 5 and 4(a) to Section 4(b). Appellees rely principally upon legislative history indicating that political subdivisions of a covered state are not afforded an opportunity to bailout under Section 4(a). Under the construction advanced by Appellees, *United States* v. *Board of Commissioners* (cited as "*Sheffield*"), 435 U.S. 110 (1978), creates a circumstance in which political subdivisions are required to preclear changes but are not allowed to exempt themselves from the Act. Such an inequity is cured by Appellants' proposed construction.

Appellants first note that the legislative history relied upon by Appellees was authored at a time when a common textual reference between Sections 4(a) and 5 did not exist in the Act. The original bailout proposal, Section 3(c) of S. 1564 and Section 3(c) of H.R. 6400, provided that bailout suits could be instituted only by states "with respect to which determinations have been made under Section (a) [the coverage formula]" or "any political subdivision with respect to which such determinations have been made as a separate unit." The original preclearance provision, Section 8 of S. 1564 and Section 8 of H.R. 6400, required preclearance by a "State or political subdivision for which determinations are in effect under Section 3(a)." Subsequently, the physical structure of the Act was

altered to provide a common reference to Section 4(b) in the bailout provision of Section 4(a) and in Section 5. While there is no legislative evidence to indicate that this change was made in order to allow political subdivisions within covered jurisdictions to bailout, this Court's opinion in *Sheffield,* construing Sections 4(b) and 5, established this proposition.

In light of the plain meaning given to the words of the Act in *Sheffield,* the legislative material referred to by Appellees should be disregarded. *See* Appellants' Brief at 45 n.26 and cases cited therein. See *Packard Motor Car Co.* v. *NLRB,* 330 U.S. 485, 492 (1947); *Taft* v. *Commissioner,* 304 U.S. 351, 359 (1938); *Osaka Shosen Kaisha Line* v. *United States,* 300 U.S. 98, 101 (1937); *National Home for Disabled Volunteer Soldiers* v. *Wood,* 299 U.S. 211, 216 (1936); *Wilbur* v. *United States,* 284 U.S. 231, 237 (1931); *Crooks* v. *Harrelson,* 282 U.S. 55, 59-60 (1930); *George Van Camp & Sons* v. *American Can Co.,* 278 U.S. 245, 253 (1929); *Chung Fook* v. *White,* 264 U.S. 443, 445-46 (1924); *Corona Coal Co.* v. *United States,* 263 U.S. 537, 540 (1924); *Pennsylvania R.R.* v. *International Coal Mining Co.,* 230 U.S. 184, 199 (1912); *St. Louis, I.M. & S.R. Co.* v. *Taylor,* 210 U.S. 281, 295 (1908). *See also Regents of the University of California* v. *Bakke,* 438 U.S. 265, 417-418 (1978) (BURGER, C. J., STEWART, J., REHNQUIST, J., and STEVENS, J., concurring in part and dissenting in part); *Greyhound Corp.* v. *Mt. Hood Stages, Inc.,* 437 U.S. 322, 330-331 (1978); *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 472-74 (1977); *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 201 (1976); *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975); *United States* v. *Sisson,* 399 U.S. 267, 297-98 (1970); *Richards* v. *United States,* 369 U.S. 1, 9-10

(1962); *United States* v. *Oregon,* 366 U.S. 643, 648 (1961); *United States* v. *Public Utility Commission,* 345 U.S. 295, 314-16 (1953); *United States* v. *Great N. Ry. Co.,* 343 U.S. 562, 575 (1952); *Gemsco, Inc.* v. *Walling,* 324 U.S. 244, 260-66 (1945); *United States* v. *Missouri Pac. R. R.,* 278 U.S. 269, 278 (1929); *United States* v. *Lexington,* 232 U.S. 399, 409-411 (1914).

Appellees also suggest that if the construction of Sections 4(a), 4(b), and 5 proposed by Appellants is accepted, a floodgate of litigation will be opened upon the United States District Court for the District of Columbia. Since Appellees acknowledge the "burden" of bailout litigation, Appellees' Brief at 46, their survey is not persuasive that a flood will be forthcoming. Appellees' survey does demonstrate the pervasive impact of Section 5 and the extent to which it constitutes an intrusion upon the functions of many political subdivisions. The availability of bailout has constitutional significance, *South Carolina* v. *Katzenbach,* 383 U.S. 301, 331 (1966), and thus its availability to political subdivisions innocent of discrimination in voting practices should not be foreclosed because of perceived judicial inconvenience.

Appellees argue, for the first time, that Rome, even if allowed to bailout, could not effect the political changes and annexations here at issue, because such legislation was enacted by the Georgia General Assembly. Appellees' Brief at 48 n.30. This suggestion overlooks Section 51.8 of the Attorney General's regulations, 28 C.F.R. § 51.8, which sets forth the parties responsible for making Section 5 submissions. See Appellants' Brief at 5b-6b. "Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the State or political subdivision

in which the change is proposed to be effective." (emphasis added) Moreover, as the unitalicized portion of the quotation from Section 5 set forth in Appellees' Brief at note 30 indicates, Section 5 is addressed to jurisdictions that "seek to administer" voting changes.

V.

THE CONSTITUTIONAL LIMITS UPON THE POWER OF CONGRESS WITH RESPECT TO SECTION 5 OF THE ACT

Appellees seem to concede that only intentional acts violate Section One of the Fifteenth Amendment. Appellees' Brief at 59. Thus, the issue now before the Court is whether Congress may, through Section 5 of the Act, proscribe electoral changes and annexations which have been found to be enacted without a discriminatory purpose but which may have a differential impact upon identifiable racial groups.

Initially, Appellants reiterate that this issue was not decided by *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), which dealt with purposeful racial discrimination. Moreover, Appellants have not sought to resubmit the argument rejected in *South Carolina* v. *Katzenbach* that Section Two of the Amendment only prohibits practices which have been judicially determined to be violative of Section One. Appellants' Brief at 60. Congressional determinations of the existence of constitutional violations are appropriate, so long as they are made within the framework of the Section One requirement of purposeful discrimination.

Similarly, Appellants have not challenged the coverage formula of the Act. See Appellees' Brief at 53-54. Appellants urge, rather, that the standard to be applied by the Attorney General and the United States

District Court for the District of Columbia, in considering the preclearance of changes submitted by a jurisdiction within a covered State, can be no broader than the standards of the Constitution itself, and to the extent that Congress has sought to establish a broader, non-purposeful standard, it has acted without constitutional power.

The failure of this Court in *South Carolina* v. *Katzenbach* to overrule *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45 (1959), is not dispositive of Appellants' constitutional claims. *Lassiter* held that literacy tests are not *per se* violations of the Fifteenth Amendment. However, *Lassiter* dealt with a literacy test, fair on its face, as to which no discriminatory application had been charged in the record before the Court. 360 U.S. at 53. The Court, therefore, had no facts to support a finding of a violation of Section One of the Amendment. *South Carolina* v. *Katzenbach,* on the other hand, dealt with a statute based upon exhaustive congressional findings that literacy tests within the covered jurisdictions violated Section One of the Fifteenth Amendment because they were used as instruments of intentional racial discrimination. Although a prior judicial determination is not required, Congress may prohibit only violations of Section One of the Amendment.

The opinions in *Oregon* v. *Mitchell,* 400 U.S. 112 (1970), cited by Appellees are consistent with Appellants' position. Each Justice upheld the nationwide ban on literacy tests because the use of such tests denied the vote to black persons educated in dual school systems in violation of the Fourteenth Amendment. It is appropriate to ban literacy tests because of the nexus between the effects of unconstitutional education and the

failure to pass literacy tests. The changes here at issue have no such nexus with previous constitutional violations.

VI.

THE IMPACT OF SECTION 5 OF THE ACT UPON BASIC CONCEPTS OF FEDERALISM

In questioning the continuing constitutionality of Section 5 of the Act, Appellants ask this Court neither to "decide the lifespan of the Voting Rights Act," Appellees' Brief at 66, nor to question its "usefulness." *Id.* More fundamentally, Appellants maintain that this Court's conditional constitutional approval of Section 5 was based upon emergency conditions in the covered jurisdictions which no longer exist and did not exist in 1975 when Section 5 was reenacted. In the absence of such compelling justifications, Section 5 must be struck down as violative of basic principles of Federalism and rights protected by the First, Fifth, Ninth, and Tenth Amendments.

Appellees have misconstrued Appellants' reliance upon *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), which establishes affirmative limitations upon the power of Congress when it acts with respect to the States. Appellants recognize that the power of Congress under the Commerce Clause and under the Reconstruction Amendments is quite different. The Fourteenth and Fifteenth Amendments "directly prohibit certain activities by the States," Appellees' Brief at 65; however, *National League of Cities* v. *Usery* recognizes the existence of affirmative protections embodied in principles of Federalism which cannot be overridden when a political subdivision has not engaged in constitutionally prohibited activities. *Fitzpatrick* v. *Bitzer,* 427 U.S. 445 (1976), is not inconsistent with this view. Where there has been, as in the present case, no violation of the normative terms of the Fifteenth Amendment, congressional action that eviscerates state enactments, protected by Article IV, Section 4 and the Tenth Amendment, is unconstitutional. Moreover, Appellees' argument that Section 5 is a permissible "prophylactic rule," Appellees' Brief at 21, is particularly offensive to the principles of Federalism and contrary to this Court's holding in *Rizzo* v. *Goode,* 423 U.S. 362, 378 (1976). While the structure of Rome's government may not comport with the views of the Department of Justice, it is nevertheless protected by the principles of Federalism, so long as it does not violate the Fifteenth Amendment.

VII.

PRECLEARANCE BY THE ATTORNEY GENERAL

Appellees' argument that the preclearance of the Georgia Municipal Election Code did not constitute preclearance of certain identical procedures previously effected by Rome overlooks the Attorney General's regulations. Section 51.8 specifically provides: "When one or more counties within a State will be affected, the State may submit a change affecting voting on behalf of the covered county or counties." 28 C.F.R. § 51.8; Appellants' Brief at 6b. Although acting without the benefit of such regulations in 1968, the Attorney General of the State of Georgia submitted the Municipal Election Code in this fashion. App. at 97. Appellees now argue that this submission was ineffective, as to the City of Rome, presumably because its Charter was not included with the Georgia submission. Appellants disagree with Appellees' "floodgates" approach to Section 4(a), but it should be noted that

the construction of 28 C.F.R. § 51.8 advanced by Appellees will require state attorneys general to submit individual legislative material for each political subunit within their states. In the case of Georgia alone, the submission of material for each of 530 incorporated municipalities and, at least, 347 subsidiary governmental bodies, would be required. Appellees' Brief at 1a.

Appellees also maintain that without a review of Rome's Charter or some other form of individual submission, the Attorney General was unable to assess the effect of the 1968 Municipal Election Code upon Rome's electoral system. The logical extension of this position is that no assessment of "effect" could have been made with respect to the 1968 Municipal Election Code. This Code applied only to municipal elections conducted within the State of Georgia, and Georgia's submission contained no City Charters or other materials with respect to specific municipalities. However, the Attorney General did question the impact of the 1968 Municipal Election Code upon certain municipalities, other than Rome. App. at 54. *See* Appellants' Brief at 92-93. The Attorney General's failure to take similar actions with respect to Rome has never been explained by Appellees.

Appellees assert that the Attorney General "reasonably" analogized Rome's voluntary supplement of its request for reconsideration to an incomplete initial submission. Appellants disagree with the propriety of such an analogy, but, in any event, the entire structure of the Attorney General's regulations is inconsistent with such a construction. See 28 C.F.R. §§ 51.3(d), 51.10(a), 51.18(a), and 51.24 (1978). The regulations specifically set forth the circumstances during which the time for response to a request for reconsideration will be tolled

during the reconsideration process. Having established the time limits for responses to reconsideration, including extensions of such time limits, the Attorney General should not now be heard to claim that unwritten interpretations of that time period exist. Such a construction is inherently unreasonable; it violates the principle of *expressio unis est exclusio alterius* and sound principles of administrative law.

Appellees also argue that if the Attorney General failed to respond properly to Appellants' request for reconsideration, such a failure had no effect. Appellees are reluctant to analogize the failure to respond to a reconsideration petition to a failure to respond in a timely manner to an initial submission, although they readily analogize a supplementary submission to an incomplete initial submission. The regulations do not state that an objection will be deemed withdrawn if the Attorney General fails to act on a request for reconsideration within sixty days. However, 28 C.F.R. § 51.3 (d) indicates that the Attorney General "shall decide" within sixty days of receipt of a request for reconsideration. Similarly, 28 C.F.R. § 51.24 provides that the Attorney General "shall notify" a submitting authority within sixty days of a request for reconsideration. Both sections impose mandatory requirements upon the Attorney General. If he wishes to continue his objection, he must "decide" and "notify" the submitting jurisdiction. Appellees argue that the Attorney General may continue an objection either by "deciding" and "notifying" or by doing nothing. As the court below noted, the language of Section 51.3(d) is "mandatory rather than permissive and . . . it tracks the time requirement for responses to initial submissions, which is statutorily binding on the Attorney General." Juris.

State. at 27b n.62. The court below suggests that the time limit is "binding," rather than "merely advisory." Juris. State. at 27b-28b n.63.

Finally, Appellees indicate that a failure by the Attorney General to respond to a request for reconsideration within the required time "might" entitle the petitioning authority to seek a court order requiring prompt consideration. *Morris* v. *Gressette,* 432 U.S. 491 (1977), is cited as authority, to some extent, to support this suggestion. However, the court below noted that "under the teachings of *Briscoe* v. *Bell,* 432 U.S. 404 (1977), and *Morris* v. *Gressette,* 432 U.S. 491 (1977), we are unwilling to second-guess the Attorney General on an issue implicating his unreviewable judgment of the merits of a Section 5 application." Juris. State. at 28b n.64. Thus, this novel additional step in the preclearance process is unavailable.

VIII.

SUMMARY

The Appellees' position with respect to the proper construction of Section 5 of the Act and the power of Congress under Section Two of the Fifteenth Amendment has failed to recognize the singular nature of the present case. This is the first case to come before this Court in which a political subdivision seeks to administer political changes and effect annexations which have been found to meet the "purpose" standard of Section 5 of the Act and the Constitution.

The Attorney General has imposed upon Rome, and approximately 7,000 other political subdivisions, certain categorical conceptions arising from the unique circumstances that prompted the passage of the Act in 1965. The imposition of these conceptions, together with the policies formulated by his office with respect to the proper structure of local government, threatens, in words borrowed from Professor Tribe, to "short-circuit the pluralist processes of interest accommodation usually structuring legislative decisionmaking." L. TRIBE, A TREATISE ON AMERICAN CONSTITUTIONAL LAW 288 (1978). The imposition of such a political orthodoxy is not constitutionally permissible in the circumstances of this case.

IX.

CONCLUSION

The judgments of the District Court dismissing Appellants' case and granting Appellees' Motion for Summary Judgment should be reversed. The City of Rome should be exempted from the Act, or Section 5 of the Act should be declared unconstitutional. Absent either such holding, Appellants pray that the electoral changes and annexations at issue be declared to be effective, either pursuant to the terms of Section 5 or by reason of the actions of the Attorney General in this case.

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CITY OF ROME, BRUCE HAMLER, and H. F. HUNTER, JR.,
Appellants,

v.

UNITED STATES OF AMERICA, GRIFFIN B. BELL, Attorney General of the United States, and DREW S. DAYS III, Assistant Attorney General of the United States,
Appellees.

On Appeal From the United States District Court for the District of Columbia

BRIEF OF THE STATE OF MISSISSIPPI AS AMICUS CURIAE

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On Appeal From the United States District Court for the District of Columbia

BRIEF OF THE STATE OF MISSISSIPPI AS AMICUS CURIAE

This brief is submitted pursuant to the privileges granted a State through its Attorney General under Supreme Court Rule 42(4).

QUESTION ADDRESSED

The State of Mississippi confines its presentation as *amicus curiae* to discussion of the questions of whether

this Court (a) should reverse its prior decisions upholding generally the constitutionality of 42 U.S.C. 1973c (1970) [hereinafter Section 5 of the Voting Rights Act], or (b) having extended the scope of Section 5, as presently applied in the wake of judicial determinations and administrative misapplications based upon this Court's precedents, it has become unconstitutional.

INTEREST OF THE STATE OF MISSISSIPPI

As one of the jurisdictions covered by the Voting Rights Act of 1970, as amended, the State of Mississippi *qua* State, and with regard to its component political subdivisions, has a significant and continuing interest in the current status of the constitutionality of Section 5 of the Act. Mississippi supports the position adopted by the City of Rome with regard to the construction of the phrase "does not have the purpose and will not have the effect," with respect to the triggering mechanism for Section 5.

Under Section 5, State interests have been subjected to significant apprehension as a result of this Court's interpretation of the scope and extent of that section's operation. The State of Mississippi has found through years of litigation in the federal courts, that under Section 5 there exists a statutory right without an effective judicial or administrative remedy. This would likely be the case even if the provisions of the Voting Rights Act were confined to the evident plain meaning of the words of the statute. But compounding the interpretations of federal courts at all levels, is the application by the Department of Justice of its own interpretation of those various court decisions. These Departmental interpretations are further complicated by

its own application of intra-Departmental policies and procedures in the operation and execution of the provisions of Section 5. The result is that all covered jurisdictions, from that of a sovereign State down to the smallest school district, must traverse a maze of finite approval stages within the Department or the federal courts. Even if officials at these levels have access to clear and undisputed facts in each case, the prospective variables of ignorance, mistake and plain misfeasance at the administrative level cause the application of Section 5 of the Voting Rights Act to fall before the constitutional requirement of "appropriateness" under Section 2 of the Fifteenth Amendment.

For these reasons, because Mississippi has an interest in protecting its inchoate authority as a State in the orderly operation of state and local government and in future litigation in federal courts at all levels, it presents this supportive brief in the present action.

STATEMENT OF THE CASE

As a local jurisdiction covered under Section 5 of the Voting Rights Act, the City of Rome, pursuant to that provision's preclearance requirement, sought approval by the Attorney General of the United States to effectuate certain changes in its City Charter. These changes included the creation of a seemingly simple majority vote requirement for the City Commission and the Board of Education elections, along with the creation of numbered posts for those elections; the establishment of ward residency requirements for the Board of Education elections only; and the institution of staggered terms for both the City Commission and the Board of Elections. JURISDICTIONAL STATEMENT 5-6. In one form or another, the Attorney General inter-

posed objections to all of these changes on two separate occasions in 1975 and 1976. The City then filed a 42 U.S.C. 1973b [Section 4] action seeking a declaratory judgment in the District Court for the District of Columbia. The sum and substance of that court's holding was that while the City was found to have acted without invidious "purpose," it was nevertheless found to have an *unintended* effect adverse to the class of voters protected by the Voting Rights Act. Appeal lies directly to this Honorable Court pursuant to 42 U.S.C. 1973b(a) and 42 U.S.C. 1973c. *Id.* 7-9.

SUMMARY OF ARGUMENT

The State of Mississippi seeks to persuade this Court to reconsider its decision in *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), finding Section 5 of the Voting Rights Act of 1965 to be constitutional within the ambit of the Enforcement Clause of the Fifteenth Amendment. For the reasons urged in separate and dissenting opinions since that case, it has now become clear that Section 5 of the Voting Rights Act is and always has been unconstitutional. Its threshold violation is of the fundamental principle of federalism inherent in our constitutional system. The vesting of authority in a single individual to effectively veto the operations of an integral component of this Federal Union is to reduce the States to colonial or palatinate status. This is a direct contravention of the Guarantee Clause of Article IV, Section 4 of the United States Constitution. There, in point of fact, the affirmative duty is placed upon the central government to preserve and guarantee republican government, rather than create statutory and administrative barriers to its orderly function.

Assuming *arguendo* that Section 5 of the Voting Rights Act is not unconstitutional on its face, it has become unconstitutional as applied pursuant to its piecemeal interpretation by federal courts at all levels, and by the arbitrary, capricious and ofttimes malpracticed administration by the Department of Justice. From the initial decisions by this Court applying the Act's remedies to state and federal elections, to those decisions extending its administrative guidelines to the smallest political component in the covered States, the statutorily-required preclearance procedures have burgeoned into incredible complexity and delay. The procedures comprehended in the language of the Act itself, from the sixty-day submission period to *de novo* proceedings before an independent three-judge federal tribunal, have resulted in litigatory and financial burdens which no right-thinking legislator could have intended for Section 5 to have visited upon the covered jurisdictions. Certainly the lengths to which the courts and the Department of Justice have required these jurisdictions to go in order to exercise even the most basic electoral and governmental powers cannot any longer be said to be "appropriate" under the Fifteenth Amendment.

This is especially clear since both Mississippi, and the City of Rome, Georgia (and, indeed, along with the South in general) have, in the thirteen years since the initial findings regarding the constitutionality of Section 5, experienced dramatic social, economic and political changes. This positive progress has resulted in making Section 5 superfluous at best and an administrative burden at worst for the free and unfettered access to the very electoral system it was designed to enhance and facilitate to begin with.

Finally, Mississippi emphasizes the inherent authority of this Court to reverse itself, especially where constitutional rulings are concerned. Not only is it within the Court's endemic authority to override precedent, but it also becomes its duty to do so where the passage of time clearly establishes the need to act in the Court's continuing protection of our Constitution as the organic law of the nation.

For these and other reasons elucidated herein, Mississippi supports the City of Rome's application for reversal of the judgment below.

I. Section 5 of the Voting Rights Act Is and Always Has Been Unconstitutional.

In much the same way as the first Mr. Justice Harlan in dissent anticipated the true meaning of the Equal Protection Clause of the Fourteenth Amendment in *Plessy* v. *Ferguson,* 163 U.S. 537, 559-560 (1896), so too was Mr. Justice Black incisively aware of the prospective impact of the operation of Section 5 of the Voting Rights Act on constitutional government in the United States. In the central case at issue here, *South Carolina* v. *Katzenbach,* 383 U.S. 301 (1966), upholding the constitutionality of Section 5, Mr. Justice Black filed what has come to be a classic dissent. Protesting against the justiciability of the issue to begin with, and concerned about the further liquidation of the Guarantee Clause, Justice Black objected that the mendicant requirement of Section 5 "so distorts our constitutional structure of government as to render any distinction drawn on the Constitution between State and Federal power almost meaningless." *Id.* at 358. In a central government of delegated powers, he argued, if the "reserve[d] . . . powers to the

States are to mean anything, they mean at least that the States have the power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them." *Id.* at 359. With astonishing prescience for the bureaucratic functioning of the Section 5 requirements, he noted through experience that, "I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in far away places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces." *Id.* at 359-360. He also noted the tendency toward the inevitable delegation and dispersion of power within a Section 5 type preclearance apparatus. With that delegation traditionally goes a dissipation of care and expertise in administrative decisions. Justice Black concluded that, "It is inconceivable to me that such a radical degradation of State power was intended in any of the provisions of our Constitution or its Amendments." *Id.* at 360. *Cf.* the dissenting opinion of Mr. Justice Harlan earlier in *Wesberry* v. *Sanders,* 376 U.S. 1, 38 and 48 (1964).[1]

Over the next seven years there was a steady expansion of the scope of Section 5 preclearance authority. When in 1973, the Court ruled in *Georgia* v. *United States,* 411 U.S. 526 (1973), that Section 5 preclearance requirements applied to the reapportioning of entire State legislatures, Mr. Justice Powell, in a vig-

[1] As is elucidated in greater detail in Argument II below, at p. 14, the inexorable operation of Parkinson's Law with regard to Section 5 of the Voting Rights Act has become all too grim a reality.

orous dissent, reasserted the constitutional objections voiced by Justice Black. In the *Georgia* case, Justice Powell agreeing with Mr. Justice White, objected to the extension of Secton 5 upward to incorporate the fundamental electoral partitioning of an entire State. It was, he said, "a serious intrusion, incompatible with the basic structure of our system for federal authorities to compel a State to submit its legislation for advance review." *Id.* at 545 (footnote omitted).

It is, of course, fundamental that Congress has the power to implement protective voting rights legislation pursuant to the "appropriate legislation" license of the Enforcement Clause of the Fifteenth Amendment. That authority, however, while plenary, is neither absolute nor arbitrary. All segments of the Constitution operate in harmony with all other segments, and federal authority to regulate guarantees as to voting rights must conform with authority reserved to the States to manage their own poliitcal affairs. Fundamental to those reserved rights is the authority of State legislatures, again within the context of constitutional confines, to pass State laws. As with all federal enactments, those laws have the full leeway of "necessary and proper" legislation. *Maryland* v. *Environmental Protection Agency,* 530 F.2d 215, 225 (4th Cir. 1975). This Court has long devoted careful concern to the protection of "functions essential to the separate and independent existence of the component members of the federal union." *Lane County* v. *Oregon,* 74 U.S. (7 Wall.) 71 (1869); *see also Texas* v. *White* 74 U.S. (7 Wall.) 700 (1869). While cross-currents of American society may change the focus of legislative and judicial attention in response to the needs of the body politic, a State is not a mere factor in the "shifting

economic arrangements" of society, *Kovacs* v. *Cooper,* 366 U.S. 77, 95 (1949), but is, instead, a coordinate element in our constitutional system. That system will not allow "the National Government [to] devour the essentials of State Sovereignty." *Maryland* v. *Wirtz,* 392 U.S. 183, 205 (1968) (Douglas, J., dissenting).

This Court, in a recent consideration of the traditional means and substantial needs of the structures of State and local governments, has ruled that notwithstanding a broad basis for the Federal Government's constitutional power (e.g., the Commerce Clause), Congress may not exercise that power in a fashion which "would impair . . . the States' 'ability to function effectively in a federal system.'" *National League of Cities* v. *Usery,* 426 U.S. 833, 852 (1976). There the Court held that a federal statute, constitutional on its face, was infirmly applied under the conditions as they existed at that time. "We hold that insofar as the challenged amendments operate to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress . . . ." *Id.* at 852. The Court further observed that a situational over-extension of Congress' authority to withdraw from the States the power to make fundamental intrastate decisions would leave little of the States' "'separate and independent existence'" *Id.* at 851. *See also Coyle* v. *Oklahoma,* 221 U.S. 559, 580 (1911).

The seemingly plenary power of the Enforcement Clause of the Fifteenth Amendment has thus provided a wellspring, feeding a vast reservoir of federal statutory authority in dealing with civil rights legislation. This case is confined to the dredging of merely one

estuary, Section 5 of the Voting Rights Act. *See* JURISDICTIONAL STATEMENT 5-9.

The central philosophy in upholding Section 5 as "an uncommon exercise of constitutional power," was the Court's conclusion "that exceptional conditions can justify legislative measures not otherwise appropriate" under the Constitution. 383 U.S. at 334.[2] If this constitutional philosophy is to be accepted, it must necessarily, therefore, work both ways. If the *Katzenbach* premise that extraordinary times such as the early years of the Civil Rights Movement, can produce constitutionally permissive federal legislation to deal with extraordinary civil rights deficiencies, it is also logical to conclude that changes in those conditions for the better may abate the constitutional operation of that legislation. If, therefore, the enforcement provisions of the Civil War Amendments are operative as corrective devices under the Constitution in order to insure proper access to equality for minority citizens in all phases of American social, economic, and political life, that same liberality of interpretation must also take cognizance of the turning of the seasons wherein the desired fruit has been borne and harvested. In short, the very methodology which, during a previous era became vital to the acquisition of access to the political process can—and we submit has—become an obstacle to the participatory government which it was intended to promote.

[2] We do not here dwell on the argument, but merely advert in passing to previous rulings on this precise point. This "exceptional conditions" proposition arose in more trying times in *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). There the Court in a landmark pronouncement ruled that, "Extraordinary conditions may call for extraordinary remedies [but] . . . extraordinary conditions do not create or enlarge constitutional power." *Id.* at 528.

"Appropriateness," therefore, must be considered within the context of the Constitution as it exists today.[3] Justice Powell had serious misgivings about the appropriateness of Section 5 in *Georgia* v. *United States, supra,* six years ago. While acknowledging congressional power to enact "appropriate legislation" in necessitous circumstances, he expressed "disagreement . . . with the unprecedented requirement of advance review of State or local legislative acts by federal authorities, rendered all the more noxious by its selective application to only a few States." 411 U.S. at 545, note.

Central to this case, therefore, is the contention of the City of Rome, supported by the State of Mississippi, that legislation, which under the Fifteenth Amendment was found to be constitutional and appropriate under circumstances existing thirteen years ago, can no longer be upheld on that basis due to both the very success of the legislation and the dramatic changes which were symbiotic to it. Under these conditions, both the legislation and its judicial adhesion, have, in fact, outlived the utilitarian purposes for which they were at that time intended.

In this regard, judicial analogy has been drawn between the Elastic Clause of Article I and the Enforcement Clause of the Fifteenth Amendment. *See United States* v. *State of Louisiana,* 225 F. Supp. 353, 360 (E.D. La., 1963). But this analogy standing alone—even without the fresh viewpoints of modern social and

[3] Indeed, even the precipatory case of *Brown* v. *Board of Education,* 347 U.S. 483 (1954) found that the Civil War Amendments must be viewed in their "*present* place in American life throughout the Nation." (emphasis added) *Id.* at 492 493.

political developments—cannot bear the full weight of constitutional imprimatur. If any analogy is to be drawn, it should be one which emphasizes the composition of two separate and vital elements in this parallel, i.e., that "appropriate" legislation not only conform to the denotation of that term, but also that it meet the separate requirements of being both *"necessary"* and "proper." Appellants and *amicus* contend that Section 5 no longer meets the constitutional requirement of these parameters. These results obtain essentially because of the dramatic changes in Southern political life since the inception of Section 5 remedies. They also contend that Section 5 in particular has reached the limit of its productivity under the Constitution and therefore should be pruned from the corpus of federal constitutional law so as to allow the continued organic growth of democratic participatory government in the States affected.

To begin with, the primary intent of the Voting Rights Act, dramatic increase in Black voting registration, has become a *fait accompli* in every Southern State.[4] The electoral consequences of this dramatic increase were inevitable, and blacks now hold more offices in the Southern States than in any other region in America.[5] This proportion of minority leadership is al-

[4] The biggest gains have been in Mississippi, where black registration went from 6.7% to 59.8%; in Georgia the black percentage went up from 27.4% to 52.6%. Overall, by 1969, black registration had quadrupled in the States covered by the Voting Rights Act. J. Hanus, et al., The Voting Rights Act of 1965 as Amended: History, Effects, and Alternatives (CONGRESSIONAL RESEARCH SERVICE, June 17, 1975, *revised* November 19, 1975) [hereinafter, LEGISLATIVE HISTORY].

[5] The latest statistics on black elected officials are reflective of the saturation effect of the Voting Rights Act itself. As of July 1978, there was a total of 4,503 black elected officials in the United States.

most certain to be significantly increased as a result of the implementation of the most recent legislatively enacted reapportionment plan approved for the State of Mississippi by a three-judge federal court for the District of Columbia under the Section 5 court alternative preclearance provision of the Voting Rights Act, *Mississippi* v. *United States,* Civ. No. 78-1425 (D.D.C., June 1, 1979), *motion for stay denied* in *Henry, et al.* v. *Mississippi,* No. A-1067 (S.Ct., June 18, 1979);[6] and doubtless also by both Mississippi's and Georgia's 1980 legislative reapportionment. These statistics conform to the plain meaning concept of the law and are immensely illuminating with regard to the dramatically changed political conditions in the States covered by Section 5.

Nor are the benefits of these dramatic gains likely to suffer retrenchment as a result of the overruling of this Court's decision in *South Carolina* v. *Katzenbach,* viz Section 5 of the Voting Rights Act. There remain a plethora of legal, statutory and equitable remedies available to private plaintiffs with the eager assistance of the Department of Justice and all its many resources in the continued maintenance and protection of all man-

The eleven Southern States account for 2,230 or 55.7% of them. Mississippi ranks second in the nation in the total number of black elected officials (303), while Georgia ranks sixth in the nation (228). Georgia ranks second in the nation in the number of black elected officials holding *two* offices (3). Mississippi and Georgia alone account for 11.8% of the total black elected officials in the United States. Joint Center for Political Studies, NATIONAL ROSTER OF BLACK ELECTED OFFICIALS ix-x (1978).

[6] A black State Senator, the first in modern Mississippi history, was elected in a special election called by the U.S. District Court for the Southern District of Mississippi in a district whose configuration is nearly identical to the Senate District approved in *Mississippi* v. *United States. Id.*

ner of civil rights under the Thirteenth, Fourteenth and Fifteenth Amendments. *See Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968) (these Amendments operate to strip away all "badges and incidents of slavery"). Moreover, public interest groups, political leadership, and more especially black leadership in elected and appointed positions of public trust and power, in the South would prevent any regression to the practices of a previous era.

Thus, in view of the burdensome consequences attending the passage and sustaining of Section 5 of the Voting Rights Act, its constitutionality ought to be reconsidered in light of the fifteen years of experience and practice since its enactment. It is our view that if the Court were now to undertake such analysis, it would find that what seemed to many an incursion on the constitutional rights of the States which may have been justified under the concept of a "living Constitution," is no longer required.

II. Assuming Arguendo That Section 5 of the Voting Rights Act Is Not Unconstitutional On Its Face, It Has Become Unconstitutional As A Result Of Judicial Determination and Administrative Misapplication.

This Honorable Court has previously upheld the constitutionality of the enactment of the Voting Rights Act and its Section 5 preclearance mechanism, *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966), and its amendments, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970). In addition, this Court has been called upon on numerous other occasions to deal with the applicability of Section 5 in particular to various situations and units of government in the affected States. On separate occasions this Court has held that the broad purview of Section 5 encompasses electoral activity in congressional districts, *Lucas* v. *Rhodes*, 389 U.S. 212 (1967); local units of government, *Avery* v. *Midland County*, 390 U.S. 474 (1968); activities of citizens as private attorneys general, *Allen* v. *Board of Elections*, 393 U.S. 544 (1969); selection of presidential electors, *Moore* v. *Ogilvie*, 394 U.S. 814 (1969); the impact of educational levels on the electoral process, *Gaston County* v. *United States*, 395 U.S. 285 (1969); the shift to at-large municipal elections, *Perkins* v. *Matthews*, 400 U.S. 379 (1971); state reapportionment plans, *Georgia* v. *United States*, 411 U.S. 526 (1973); at-large county elections, *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976); municipal subdivisions, *United States* v. *Board of Commissioners of Sheffield*, 435 U.S. 110 (1978); and participation of public personnel in elections, *Dougherty County Board of Education* v. *White*, —— U.S. ——, 99 S.Ct. 368 (1978).

Appellants and *amicus* submit that this piecemeal interpretation of Section 5 has spread its intended force and effect over an area well beyond that intended by Congress or manageable by those in the Department of Justice responsible for executing these decisions. Our position conforms to that of Mr. Justice Powell in his dissent in *Dougherty County Board of Education* v. *White*, where he averred that, "The Court's ruling is without support in the language or legislative history of the [Voting Rights] Act." His conclusion was that, "Indeed, if the Court truly means that any incidental impact on elections is significant [enough] to trigger the preclearance requirement of § 5, then it is difficult to imagine what source of state and local enactments

would *not* fall within the scope of that section." —— U.S. at ——, 99 S.Ct. at 380. (footnotes omitted)[7]

The philosophical premises of our judicial system, of course, allow an appellate court to review statutory law only by chance, when litigation happens to arise in the accusatorial process. The necessitous installment interpretation of Section 5 has nonetheless had an adverse and unfortunate effect not only on the purpose of the Voting Rights Act itself, but also on the confluent operation of the two tiers of the federal system. These situational interpretations of the applicability of the coverage of Section 5 have resulted in the fragmenting of the powers of federalism and their absorption in the vacuum of centralized authority. Nonetheless, all of the political entities within and including the States covered by the Section 5 preclearance requirements have, pursuant to this Court's decisions, been forced to shoulder a burden which increases geometrically in proportion to a political subdivision's inability to sustain it. The result is that the smaller the governmental unit captured by Section 5, the greater its proportionate burden in bearing up under the judicial and administrative burdens. As already noted, *absent* Section 5 preclearance procedures, political minorities would still

[7] Speaking in a footnote to the question of the constitutionality of Section 5, Justice Powell's dissent adverted to the fact that in addition to himself—he cited his previous dissent in *Georgia* v. *United States*, 411 U.S. at 545—"Other Members of this Court have also expressed misgivings about the constitutionality of Section 5." In addition to referring to Mr. Justice Black's dissenting views in *South Carolina* v. *Katzenbach*, in 1966, 383 U.S. 301, 358, he also cited Justice Harlan's concurring and dissenting opinion in *Allen* v. *State Board of Elections*, 393 U.S. 544, 586 (1969), and Chief Justice Burger's concurring opinion in *Georgia* v. *United States*, 411 U.S. 526, 545 (1973). —— U.S. at ——, 99 S.Ct. at 377, n. 1.

retain a multiplicity of remedies in order to protect their rights. But with the *continued* interference of the administrative requirements of Section 5, States and their component political subdivisions are technically given administrative and judicial appeal rights but realistically denied them in the ensuing process.

Section 5, as it stands today, therefore, provides the States with a technical right without an effective remedy. It does not strain the concept of this Court's power of judicial notice for it to take cognizance of Mississippi's experiences with Section 5. Mississippi is economically a poor State composed of political subdivisions whose economic resources are relatively meager. Yet their experiences with Section 5 are not untypical. The operation of both the administrative and litigatory alternatives of Section 5 has the inevitable effect of requiring the smallest governmental entity to match its resources with the largest, the Federal Government. Not only for the State, but also for its smaller municipalities, its poorer counties, and independent entities such as boards of trustees of hospitals and other municipal corporations, the functional requirements of the "Washington experience" with Section 5 is prohibitory. The retention of D.C. counsel required under the local rules, the expenses involved in the location, transportation, and testimony of witnesses, and the sustaining of all other expenses attending a one- to two-week trial in the District of Columbia—not to mention an appeal to this Honorable Court—are so far beyond the capacity of governmental units such as the City of Rome and cities and towns similarly situated in *Mississippi* as to strain the credulity of even the most optimistic litigant. Indeed, in more instances than perhaps even this Court is aware, various governmental units

simply allow a Department of Justice's arbitrary objection to stand for the simple reason that in the overall scheme of things, selectivity in pursuing the appeal requires that smaller issues must be allowed to fall before the Department's *fiat*. In sum, the covered States and their subdivisions are being required to weigh issues, not on the basis of their legality or constitutionality, but rather on the basis of whether or not they can afford to make a point of exercising their constitutional rights. If anything could be found to be more objectionable than local government by federal interdiction, it must be local government by federal default. Thus by the operational effect of this Court's interpretations of Section 5, it has, while technically recognizing States' rights under Section 5, effectively cut off the remedies of smaller subdivisions within those States to appeal.

Faced with these insurmountable difficulties, the covered States have been forced to accept as a fact of life that the Department of Justice may use Section 5 as a sword as well as a shield. Under current Court decisions—as well as the Department of Justice's own interpretations of them—the implementation of Section 5 goes beyond mere Departmental approval or disapproval of a prospective change in local election laws, and is used instead to usurp the daily operation of local government. In Mississippi's experience, for example, before a small Mississippi community could be allowed to change the office of Chief of Police from an elected to an appointed position, the Department of Justice required the town officials to stipulate in advance who would be appointed to the office. The same kind of overt *political* negotiations have also been required in instances from the seemingly innocuous annexation of land for future town development to the De-

partment's selective approval of proposed legislation so that vital parts have been discarded while precatory provisions have been allowed to stand useless by themselves. Finally, with regard to the conflicting interpretations of Section 5, the Attorney General of Mississippi, on at least one occasion, has had to issue separate and conflicting opinions for the Northern District of Mississippi, under one court's interpretation, and for the Southern District of Mississippi under another, for the same statewide election.

This undue, and we believe unconstitutional, operation of Section 5 comes from the hands of an integral Department of the federal government which, under the Constitution, has an affirmative duty to protect and guarantee republican government, rather than interpose barriers to it. Functional consequences make elections almost impossible in the covered States. Mississippi has not been able to restructure its election laws for 15 years, since November 1, 1964. During that time the State's Attorney General has had to constantly build bridges between laws as enacted, statutes as approved by the Justice Department, and the situations as they have actually existed during election years. Over the years those bridges have become more and more precarious in their underpinnings and consequently have become constitutionally and legally unsafe for the support of the voting rights of *all* the citizens of the State.

It is our contention, therefore, that when the absence of rights varies inversely to available remedies, any statute requiring conformity with such a process is unconstitutional. As Mr. Justice Stone consistently pointed out, "The Constitution, viewed as a continuously operative charter of government, is not to be in-

terpreted as demanding the impossible or the impracticable." *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 145 (1941) and *Yakus* v. *United States,* 321 U.S. 414, 424 (1944). *See also* his opinion in *Hirabayashi* v. *United States,* 320 U.S. 81, 104 (1943).

Under Section 5 as it exists today, all covered States and their subdivisions, no matter how small in size, and all electoral issues, no matter how seemingly remote to the electoral process, must be submitted to the expensive legal, litigatory, and lugubrious burden of going to Washington, D.C. to appeal procedurally to the Attorney General of the United States but in reality to his subordinates, or in the alternative to an increasingly burdened federal district court there. In such a system it is not uncommon that "an erroneous judgment may stand, and acquire an undeserved authority, merely because the losing party does not appeal against it—usually for the excellent reason that he can't afford any further costs of litigation." C. Allen, LAW IN THE MAKING 298 (1958).

As already noted,[8] this Court's standing precedents now require any governmental unit to bear this expensive, time consuming, and immensely frustrating burden for all aspects of the electoral process in each and every State subdivision. But this Court has also recently taken judicial notice of a similar process with respect to the burdens of federal legislation on local participation in commerce. "Quite apart from the substantial costs imposed upon the States and their political subdivisions," the Court noted of that federal statute, "[it] displaces State policies regarding the manner in which they will structure delivery of those

[8] See *supra* pages 14-15.

governmental services which their citizens require." *National League of Cities* v. *Usery,* 426 U.S. at 847.

The operational burden of Section 5 has, at long last, come to that point in the history of this nation where it should be allowed to collapse of its own weight. In addition to the litigatory maze which any party from State to county to municipality to school board must thread, the administrative anthill of Section 5 preclearance submissions in the Attorney General's office has so leavened the quality of the administrative process as to place it beyond the ken of even the most conscientious public servant. As a direct result of this Court's previous rulings and the Attorney General's interpretation of them, the processing of these submissions has become an increasingly burdensome task for the Department of Justice.[9]

Moreover, the increased burden on the Department of Justice indisputably has had the effect of lowering the quality of attention the Attorney General and his staff can give to submissions. Whatever the jurisdic-

[9] Shortly after the passage of the Voting Rights Act, the number of submissions was negligible, averaging only about 65 per year for the first five years of the Act's existence. Of these, the Department objected to only 19 or about 5.9%. After this Court's initial rulings on the expansive nature of Section 5 *per se,* however, especially in *Allen* v. *State Board of Elections,* 393 U.S. 544 (1969), submissions increased from 255 in 1970 to 1,118 in 1971. By 1974, the total submissions had increased to 3,929. By then the Attorney General's proportionate rate of objection of 4% to 6% was resulting in a countermanding of electoral laws in about 180 cases per year. LEGISLATIVE HISTORY at 56-57. This discussion of the burdens of the administrative route under Section 5, however, is in no way meant to defer to any purported desirability of the alternative Section 5 route of litigation. See JURISDICTIONAL STATEMENT at 27.

tion, this process still requires massive amounts of man hours, legal fees, and political negotiations to produce. Indeed, this Court took judicial notice of the fact that under such conditions "the Department of Justice does not have the resources to police effectively all the States and subdivisions covered by the Act." *Perkins* v. *Matthews,* 400 U.S. 379, 396 (1971).

The inevitable result, despite the terms of the Act, is that the Attorney General must delegate to the lowest echelons of his Department, a federal statutory power of the broadest implications and results for the sovereign States of this Union and their citizens.[10] There is at least some doubt, however, as to whether the Voting Rights Act, by analogy to other federal legislation of the same era, even allows the Attorney General to delegate this authority beyond the top level of the Department of Justice. In an action based on the Omnibus Crime Control Act of 1968, this Court concluded that Congress did not intend a similar power on the criminal side to be exercised by "any individual other than the Attorney General or an Assistant Attorney General specially designated by him." *United States* v. *Giordano,* 416 U.S. 505, 508 (1974). There the Court found that the exercise of federal statutory power in a constitutionally sensitive area required "[t]he mature judgment of a particular responsible Department of Justice official [to be] . . . interposed as a critical precondition to any judicial order." *Id.* at 515-516.

[10] In at least one major case, the Attorney General literally could not make up his mind within the sixty days whether or not a jurisdiction's proposed action was objectionable. Rather than "take the chance" he therefore interposed a *nunc pro tunc* objection just to be "safe." While that action was disallowed by this Court, *Morris* v. *Gressette,* 432 U.S. 491, 507 (1977), that attempt by the Department of Justice demonstrates a disposition in the administration of the Act of a philosophy of presumptive and almost reflexive rejection. *See also City of Richmond* v. *United States,* 422 U.S. 358, 362 (1975). Early on, Mr. Justice Powell foresaw such a difficulty and was insisting in dissent that, "As a minimum, assuming the constitutionality of the Act [itself], the Attorney General should be required to comply with it explicitly and to invoke its provisions only when he is able to make an affirmative finding." *Georgia* v. *United States,* 411 U.S. at 545. *See also* the opinion by White, Powell and Rehnquist, J.J., in the same case that the Attorney General "should not be able to object by simply saying that he cannot make up his mind or that the evidence is in equipoise." *Id.*

But the level to which this decision-making process under Section 5 has devolved was astonishingly demonstrated in Mississippi's most recent administrative experience with the Department of Justice. There the functional decision to interpose an objection to Mississippi's entire statewide reapportionment plan—the same plan which was recently upheld on appeal in the judicial alternative—was left to the discretion of a second-year law student who was a paralegal on the Voting Rights staff and who had no substantive expertise in the field. *See* Defendant's Brief in *Connor, et al.* v. *Coleman, et al.,* No. 78-1013 (S.Ct., October Term, 1978), at 19, n. 15, and its Appendix at D-44. *See also* the Appellee's Brief in Response to Opposition to the Application for a Stay Pending Appeal in a companion case, *Henry, et al.* v. *State of Mississippi,* (S.Ct., October Term, 1978), at 15 n. 42. The State of Mississippi as *amicus* submits that it could never have been the intent of the Congress of the United States that one of the States of the Union or any of its political subdivisions should receive this kind of negligible attention to the expensive and painstakingly crafted efforts of an entire State legislature and administration, or

if it did so intend, this Court should never stand for it."

The declivity of administrative quality current under Section 5 is all the more distressing in view of the fact that the decisions of the Department of Justice and its Voting Rights Section are not only traditionally not reviewable, *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), but are also veiled from public and judicial scrutiny by Section 4(b) of the 1975 amendments to the Voting Rights Act. 42 U.S.C. 1973b(b). That this Court upheld the constitutionality of that section as well, offers little encouragement. *Briscoe* v. *Bell,* 432 U.S. 404, 412 (1977). *See also Morris* v. *Gressette,* 432 U.S. at 504-505 ("Since judicial review of the Attorney General's actions would unavoidably extend this [preclearance] period, it is necessarily precluded."). The sole alternative to this discouraging administrative process is to plunge once again into litigation, excessively costly to every jurisdiction in every way.

Despite the prayer of appellants in this case, supplemented by the urging of the State of Mississippi as *amicus curiae*, to persuade this Court to depart from previous decisions under federal statutory execution of a vital Amendment to the nation's Charter, these prayers are made not in derogation of, but rather in faithful defense of, the basic doctrines of participatory

[11] Earlier, Mr. Justice Black had foreseen that if the States and their subdivisions were to be required to get distant Federal preclearance in the Department of Justice, that other laws on different subjects can force the States to seek the advance approval not only of the Attorney General "but [also] of . . . any other chosen members of his staff." *South Carolina* v. *Katzenbach,* 383 U.S. at 360.

democracy under our federal system. As then-Solicitor General Stanley Reed observed, "No responsible official, jurist or statesman, has ever suggested that an effort should be made to ask reconsideration of the doctrine of dual sovereignty, separation of powers, or the supremacy of the federal Constitution." Reed, Stare Decisis and Constitutional Law, 35 PA. BAR ASSN. Q. 131, 139-140 (1938). Through these briefs, the City of Rome and the State of Mississippi seek to integrate and strengthen the symbiotic partnership of the basic component elements of our State and Federal Governments. These intonements are therefore made in obeisance to the paramount order of the Constitution. This Court is no stranger to the fact that a statute, seemingly innocuous, or even beneficial, on its face, may result in an unconstitutionality of the most pernicious sort, as applied. That concept is one against which this Court has traditionally been vigilant. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374 (1886).

III. This Court Should Exercise Its Inherent Authority To Depart From The Doctrine Of *Stare Decisis* And Overrule Precedent In This Case.

Since its initial ruling on Section 5 in *Georgia* v. *United States,* 411 U.S. 526 (1973), this Court has felt itself bound under the doctrine of *stare decisis et non quieta movere* ("adhere to prior decisions and do not

disturb settled points"). By its very nature, however, and certainly cognitive of the mass of litigation springing from its operation, Section 5 of the Voting Rights Act is *not* a settled issue. In the past, the admonition of Mr. Justice Brandeis has been urged upon the Court to the effect that, "*Stare decisis* is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than it be settled right." *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1931) (Brandeis, J., dissenting). Of course, ideally, the converse rule should be applied as it has been traditionally by this Court. "It is more important that the Court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations." *Barden* v. *Northern Pacific Railroad,* 154 U.S. 282, 322 (1893). Otherwise the doctrine would tend to persuade judges "to let bad enough alone." R. Traynor, The Limits of Judicial Creativity, 29 HAST. L. J. 1025, 1035 (1978).

The State of Mississippi thus urges this Honorable Court to be as liberal in *reappraising* the applicability of Section 5 of the Voting Rights Act as was Chief Justice Warren in speaking for the Court in *South Carolina* v. *Katzenbach,* when he acknowledged the "inventive manner," 383 U.S. at 327, of its enactment and conceded "the possibility of over-breadth" in the Act's provisions. *Id.* at 331. *See also* his language in *Allen* v. *Board of Elections,* 393 U.S. 544, 566 (1969). As Mr. Justice Frankfurter observed, "Legal doctrines are not self-generated abstract categories .... [T]hey have a specific judicial origin and etiology. They derive meaning and content from circumstances that gave rise to them and from the purpose they were

designed to serve." *Reid* v. *Covert,* 354 U.S. 1, 50 (1957) (Frankfurter, J., concurring).[12]

This capacity for constitutional change in an organic document was comprehended by Justice Douglas who observed that "*stare decisis* must give way before the dynamic component of history." W. Douglas, Stare Decisis, 49 COLUM. L. REV. 735, 737 (1949). The alternative, he said, "is to let the Constitution freeze in the pattern which one generation gave it." *Id.*

In the thirteen years since the upholding of the initial version of the Voting Rights Act, the interpretation of what was constitutionally necessary during chaotic and critical decades of American history may no longer be deemed requisite. Accommodation might be made for constitutional observance of changing mores and institutions in American life. As one constitutional scholar observed,

> Particular constitutional principles or certain applications thereof may be correct for one period of our development and yet incorrect for a future era. It is true that certain clauses of the Constitution may have a fixed, technical meaning that is susceptible of only one correct interpretation. However, most of the significant clauses speak only in generalities whose substance and importance vary with the course of history. J. Noland, Stare Decisis and the Overruling of Constitutional Deci-

[12] Thus the Court has most recently reiterated that "'*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder and verified by experience." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 58, n. 30 (1977). *Cf. Helvering* v. *Hallock,* 309 U.S. 106, 119 (1940).

sions in the Warren Years, 4 VALP. L. REV. 101, 104-105 (1969). *See also Springer* v. *Philippine Islands*, 277 U.S. 189, 209-210 (1928).

Mr. Justice Jackson also found that "individual study of [a decision's] background and antecedents, its draftsmanship and effects" are mandatory. R. Jackson, Decisional Law and Stare Decisis, 30 A.B.A.J. 334, 335 (1944). Chief Justice Roger Traynor was of a similar view, counseling that precedents "first [be] analyze[d] exhaustively . . . , particularly in the context of possibly equally strong competing claims . . . ." 29 HAST. L. J. at 1040.

Because of the viability of our Constitution, rulings on constitutional law in particular simply do not lend themselves the Talmudic permanence of transcendental morality. As Mr. Justice Cardozo noted, "The doctrine of *stare decisis*, however appropriate and even necessary at times, has only a limited application in the field of constitutional law." *St. Joseph's Stock Yards Co.* v. *United States*, 298 U.S. 38, 94 (1936). *See also James* v. *United States*, 366 U.S. 213, 222 (1960) (Black and Douglas, J.J., separate opinion); *Green* v. *United States*, 356 U.S. 165, 193 (1957) (Black, J., Warren, C.J., and Douglas, J., separate opinion); and *Glidden Co.* v. *Zdanock*, 370 U.S. 530, 541 (1962) (Harlan, Brennan, and Stewart, J.J., separate opinion). Indeed, in a landmark case of reversal, Mr. Justice Bradley, concurring, found that,

> Where the decision is recent, and is only made by a bare majority of the Court, and during a time of public excitement on the subject, when the question has largely entered into political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the Court are dissatisfied with a former decision. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 569-570 (1871).

The modern and traditional argument, therefore, with regard to previous decisions under the Voting Rights Act, that reversal of any one or more of them would have unsettling constitutional, political, and social effects, cannot withstand close scrutiny in light of the history of the Court and the nation. This would especially be the case if this Honorable Court could be persuaded, at long last, to take judicial notice of the changed and changing conditions in those jurisdictions covered by the Voting Rights Act itself. The State of Mississippi and the City of Rome, therefore, endeavor through these briefs to impress upon the Court the resultant inappropriateness under the Constitution of continued adherence to Section 5 of the Voting Rights Act.

CONCLUSION

For these reasons, therefore, the decision of the United States District Court below should be reversed.

Respectfully submitted.

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